CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 202

HARRY FLEISHER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 203

SAM FLEISHER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 204

JOSEPH STEIN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 8, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 202

HARRY FLEISHER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 203

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

UNITED STATES OF AMERICA

vs.

HARRY FLEISHER, ALIAS FLEISH, ALIAS FLEISCHER, SAM Fleisher, Alias Sam Fleish, Alias Albert Ligner, Alias Hollender, Joe Stein, Alias Joe Brown, et al.

INDICTMENT—Filed October 30, 1935

Vio: Sec. 37 C. C. Secs. 3258, 3282 and 3281 R. S. and Sec. 201, Title II of the Liquor Taxing Act of 1934

EASTERN DISTRICT OF MICHIGAN,
Southern Division:

The Grand Jurors of the United States of America empaneled and sworn in the District Court of the United States for the Eastern District of Michigan, Southern Division, and inquiring for that District, upon their oaths and affirmations present and charge: That Harry Fleisher, Alias Fleish, alias Fleischer, Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender; Joe Stein, alias Joe Brown; Jack Selbin, alias George Palmer, alias Jack Berg; Nate Kepperwas, alias Sherman, alias Cooper; [fol. 2] John J. Gettleson, alias Warren; Sam Wisotsky, Joseph Wisotsky, Thomas Hewson, Clifford Hoffman, alias Coffman; Harry Schonosky, alias Schonowsky; Jack Mankin and Everett Demel, late of the Division and District aforesaid, hereinafter referred to as defendants, and divers other persons to these Grand Jurors unknown, hereinafter referred to as co-conspirators but not defendants, herein, did, in the Eastern District of Michigan, Southern Division, from, to-wit, the 1st day of October, A. D. 1934, to and including the time of the filing of this indictment, unlawfully, feloniously, knowingly and wilfully conspire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid at, to-wit: 5620 Federal Street, in the City of Detroit, in the County

of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned time and at the aforementioned place, unlawfully, knowingly, wilfully and feloniously possess and cause to be possessed, keep in custody, control and cause to be controlled certain stills and distilling apparatus for the production of distilled spirits, and would set up and cause to be set up the said aforementioned stills and distilling apparatus without having the same registered with the Collector of Internal Revenue as required by law; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

And the Grand Jurors do further charge and present: That in furtherance of, and in execution of, and for the purpose of carrying out and effecting the object and design of the said aforementioned conspiracy the said aforementioned defendants and co-conspirators did and committed the following overt acts:

I

On, to-wit: the 10th day of April, A. D. 1935, the defendant Jack Selbin, alias George Palmer, alias Jack Berg, superintended the unloading and loading of a large quantity of sugar at the Guardian Transit Company at, to-wit: [fol. 3] 2551 16th Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

II

On, to-wit: the 10th day of April, A. D. 1935, the defendant Joseph Stein, alias Joe Brown, assisted in the unloading of a large quantity of sugar at the Guardian Transit Company at, to-wit, 2551 16th Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Second Count

And the Grand Jurors aforesaid, do further present: That heretofore, to-wit: between the first day of October, A. D. 1934, and the date of the filing of this indictment, the said defendants, Harry Fleisher, alias Fleish, alias Fleischer; Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender; Joe Stein, alias Joe Brown; Jack Selbin, alias George Palmer, alias Jack Berg; Nate Kepperwas, alias Sherman, alias Cooper; John J. Gettleson, alias Warren; Sam Wisotsky, Joseph Wisotsky, Thomas Hewson, Clifford Hoffman, alias Coffman; Harry Schonosky, alias Schonowsky; Jack Mankin and Everett Demel, late of the Division and District aforesaid and co-conspirators did, in the Eastern District of Michigan, Southern Division, unlawfully, feloniously, knowingly and wilfully conspire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid, at, to-wit: 5620 Federal Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States of America, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned time and at the aforementioned place, unlawfully, knowingly, wilfully and feloniously make and ferment and cause to be made and fermented large quantities of mash, wort and/or wash, to-wit: 42,000 gallons of mash, a mixture and compound fit for distillation and the production of distilled spirits, in a building and on premises which would not be then and there a distillery or [fol. 4] distilleries nor premises and building duly authorized and designated according to law as a distillery or distilleries; contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

And the Grand Jurors do further charge and present: That in furtherance of, and in execution of, and for the purpose of carrying out and effecting the object and design of the said aforementioned conspiracy the said aforementioned defendants and co-conspirators did and committed the following overt acts:

I

On, to-wit: the 10th day of April, A. D. 1935, the defendant Joseph Stein, alias Joe Brown, drove an Indiana

truck heavily laden from the Guardian Transit Company, at, to-wit: 2551 16th Street, Detroit, Michigan, to the Federal Warehouse, at, to-wit: 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

II

On to-wit: the 10th day of April, A. D. 1935, the defendant Jack Selbin, alias George Palmer, alias Jack Berg, parked a Ford V-8 Coupe and entered the premises of the Federal Warehouse at, to-wit: 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

III

One, to-wit: the 11th day of April, A. D. 1935, the defendant Harry Fleischer, alias Fleish, alias Fleischer, drove a Ford car to a point opposite the front entrance of a garage at 4029 Milford Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

IV

On or about the first day of December, A. D. 1935, the defendant John J. Gettleson, alias Warren, leased and paid the first month's rent for a portion of the Federal Warehouse at, to-wit: 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

[fol. 5] V

On or about the first day of December, A. D. 1934, defendant Harry Fleisher, alias Fleish, alias Fleischer, accompanied the defendant John J. Gettleson, alias Warren, to premises known as the Federal Warehouse at 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Third Count

And the Grand Jurors aforesaid do further present: That hertofore, to-wit between the 1st day of October, A. D. 1934, and the date of the filing of this Indictment, the said defendants, Harry Fleisher, alias Fleish, alias Fleischer, Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender, Joe Stein, alias Joe Brown, Jack Selbin, alias George Palmer, alias Jack Berg, Nate Kepperwas, alias Sherman, alias Cooper, John J. Gettleson, alias Warren, Sam Wisotsky, Joseph Wisotsky, Thomas Hewson, Clifford Hoffman, alias Coffman, Harry Schonosky, alias Schonowsky, Jack Mankin and Everett Demel, late of the Division and District aforesaid, and co-conspirators, did, in the Eastern District of Michigan, Southern Division, unlawfully, feloniously, knowingly and wilfully conspire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid at, to-wit: 5620 Federal Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States of America, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned time and at the aforementioned place, unlawfully, knowingly, wilfully and feloniously engage in and carry on the business of distillers without having given bond as required by law and with the intent on the part of the said aforementioned defendants and co-conspirators to defraud the government of the United States of America of the tax on the spirits which would be distilled by the said aforementioned defendants and co-conspirators; contrary to the form, force, and effect of the Act of Congress in such case [fol. 6] made and provided and against the peace and dignity of the United States.

And the Grand Jurors do further charge and present: That in furtherance of, and in execution of, and for the purpose of carrying out and effecting the object and design of the said aforementioned conspiracy, the said aforementioned defendants and co-conspirators did and committed the following overt acts:

I

On, to-wit: the 11th day of April, A. D. 1935, the defendants Jack Mankin and Harry Schonosky, alias Schonowsky,

climbed through a small hole in the west wall of the premises known and described as the Federal Warehouse, at, to-wit: 5620 Federal Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

II

On, to-wit: the 10th day of April, A. D. 1935, the defendant Joseph Stein, alias Joe Brown, drove an Indiana truck from the American Can Company, in the City of Detroit, to a garage at, to-wit: 4029 Milford Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Fourth Count

And the Grand Jurors aforesaid, do further present: That heretofore, to-wit: between the 1st day of October, A. D. 1934, and the date of the filing of this indictment, the said defendants, Harry Fleisher, alias Fleish, alias Fleisher, Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender, Joe Stein, alias Joe Brown, Jack Selbin, alias George Palmer, alias Jack Berg, Nate Kepperwas, alias Sherman, alias Cooper, John J. Gettleson, alias Warren, Sam Wisotsky, Joseph Wisotsky, Thomas Hewson, Clifford Hoffman, alias Coffman, Harry Schonosky, alias Schonowsky, Jack Mankin and Everett Demel, late of the Division and District aforesaid, and co-conspirators did, in the Eastern District of Michigan, Southern Division, unlawfully, feloniously, knowingly and wilfully con- [fol. 7] spire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid, at, to-wit: 5620 Federal Street and 4029 Milford Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States of America, to-wit: Section 201, Title II of the Liquor Taxing Act of 1934, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned times and at the aforementioned places, unlawfully knowingly, wilfully and feloniously possess a large quan-

tity of distilled spirits, to-wit: 775 Gallons of distilled spirits at 5620 Federal Street, Detroit, Michigan, and 1,500 gallons of distilled spirits at 4029 Milford Street, Detroit, Michigan, the immediate containers thereof not having affixed thereto a stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue Tax imposed on said spirits; contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

And the Grand Jurors do further charge and present: That in furtherance of, and in execution of, and for the purpose of carrying out and effecting the object and design of the said aforementioned conspiracy, the said aforementioned defendants and co-conspirators did and committed the following overt acts:

I

On or about the 8th day of April, A. D. 1935, the defendant Sam Fleisher, alias Fleish, alias Albert Ligner, alias Hollender, transported a large quantity of sugar from a point in Cleveland, Ohio, to a point in the City of Detroit, Michigan, to-wit: The Federal Warehouse, 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

II

During, to-wit: the late fall of 1934 and/or the first part of 1935, the defendant Sam Wisotsky constructed a cement block partition in the premises at, to-wit: 5620 Federal Street, in the City of Detroit, County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court.

[fol. 8] Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Gregory H. Frederick, United States Attorney. Ken C. Corbitt, Assistant United States Attorney, Eastern District of Michigan.

CJP.

A true bill. Frank Lester, Foreman.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S PLEA—March 31, 1936

The defendants Harry Fleisher, alias Fleish, alias Fleischer; Sam Fleisher, alias Sam Fleish, alias Albert Lig-
[fol. 9] ner, alias Hollender; Joe Stein, alias Joe Brown; Jack Selbin, alias George Palmer, alias Jack Berg; John J. Gettleson, alias Warren; Thomas Hewson; Clifford Hoffman, alias Coffman; Jack Mantin and Everett Demel being present in court and being arraigned on the indictment heretofore filed against them, each waive the reading thereof and stands mute, thereupon a plea of not guilty is entered herein as to each of said defendants under direction of the Court. Thereupon the Court do now here order the appearance bonds of said defendants and the appearance bond of defendant Harry Schonosky alias Schonowsky continued in full force. It is further Ordered by the Court that defendants Nate Kepperwas, alias Sherman, alias Cooper; Sam Wisotsky and Joseph Wisotsky be and they are hereby remanded to the custody of the United States Marshal to await Trial.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—April 9, 1936

[fol. 10] The jurors heretofore empaneled and sworn in this case come into Court again and sit together and hear the arguments of attorneys for respective parties and the charge of the Court and retire under the charge of officers duly sworn for that purpose to consider of their verdict to be rendered, and after being absent for a time return into Court and say upon their oaths that said defendants, Harry Fleisher, alias Fleish, alias Fleischer, Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender, Joe Stein, alias Joe Brown, Jack Selbin, alias George Palmer, alias Jack Berg, are guilty of the charges in said indictment contained.

Thereupon the Court do now here order sentence of said defendants deferred until April 15th, 1936, and appearance bonds of said defendants heretofore filed herein continued in full force.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SENTENCE OF THE COURT IMPOSED ON HARRY FLEISHER—April 15, 1936

[fol. 11] The defendant, Harry Fleisher, alias Fleish, alias Fleischer, being present in court, and having heretofore on April 9th, 1936, been found guilty of the charges in said indictment contained, and now being placed at the Bar of the Court for sentence, and duly inquired of by the Court what he had to say why sentence should not be imposed upon him, and the Court having fully heard and considered all that said defendant had to say in that behalf, thereupon the Court do now here sentence the said defendant Harry Fleisher, alias Fleish, alias Fleischer, as follows:

On Count One, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars, and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and including this day:

On Count Two, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count One:

On Count Three, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated [fol. 12] by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count Two:

On Count Four, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count Three:

Said fines to be accumulative.

Said defendant to stand committed until the terms of this sentence are complied with.

It is further ordered by the Court that the appearance bond of said defendant be, and it hereby is cancelled and discharged.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SENTENCE OF THE COURT IMPOSED ON SAM FLEISHER—April 15, 1936

[fol. 13] The defendant, Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender, being present in court, and having heretofore on April 9th, 1936, been found guilty of the charges in said indictment contained, and now being placed at the Bar of the Court for sentence, and duly inquired of by the Court what he had to say why sentence should not be imposed upon him and the Court having fully heard and considered all that said defendant had to say in that behalf, thereupon the Court do now here sentence the said defendant Sam Fleisher, alias Sam Fleish, alias Albert Ligner, alias Hollender, as follows:

On Count One, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and including this day:

On Count Two, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count One:

On Count Three, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count Two:

On Count Four, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an institution to be designated by the Attorney General of the United States for the full

period of two (2) years from and after expiration of term of imprisonment imposed on Count Three:

[fol. 14] Said fines to be accumulative.

Said defendant to stand committed until the terms of this sentence are complied with.

It is further ordered by the Court that the appearance bond of said defendant be; and it hereby is cancelled and discharged.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SENTENCE OF THE COURT IMPOSED ON DEFENDANT JOSEPH STEIN—April 15, 1936

The defendant, Joe Stein, alias Joe Brown, being present in court, and having heretofore on April 9th, 1936, been [fol. 15] found guilty of the charges in said indictment contained, and now being placed at the Bar of the Court for sentence, and duly inquired of by the Court what he had to say why sentence should not be imposed upon him, and the Court having fully heard and considered all that said defendant had to say in that behalf, thereupon the Court do now here sentence the said defendant Joe Stein, alias Joe Brown, as follows:

On Count One, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and including this day:

On Count Two, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count One:

On Count Three, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be imprisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count Two:

On Count Four, to pay to the United States of America a fine of Five Thousand ($5,000) Dollars; and to be im-

prisoned and kept at and in an Institution to be designated by the Attorney General of the United States for the full period of two (2) years from and after expiration of term of imprisonment imposed on Count Three:

Said fines to be accumulative.

Said defendant to stand committed until the terms of this sentence are complied with.

It is further ordered by the Court that the appearance bond of said defendant be, and it hereby is cancelled and discharged.

[fol. 16] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF HARRY FLEISHER

Name and address of Appellant: Harry Fleisher, 593 Hague, Detroit, Michigan.

Names and addresses of Appellant's Attorneys: Alfred A. May, 1459 National Bank Bldg., Detroit, Mich. George S. Fitzgerald, 3123 Barlum Tower, Detroit, Mich. Arthur H. Ratner, 1109 Guaranty Bldg., Detroit, Mich. Donald B. Frederick, 1706 Dime Bank Bldg., Detroit, Mich.

Offense: Conspiracy to illegally possess a still and to make mash and distill spirits without paying the revenue required by law, and to fail to give bond as required by the Revenue Act.

Date of Judgment: April 15, 1936.

Brief Description of Sentence: Harry Fleisher: Eight years at a Penitentiary to be designated by the Attorney General and $20,000.00 fine.

Name of Prison where now confined: The defendant is at present confined in the Federal Detention Farm, Milan, Michigan, awaiting transportation to a Penitentiary to be designated by the Attorney General, if bail will not be granted.

I, the above named defendant and appellant, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment and sentence above mentioned, on the grounds set forth below.

Harry Fleisher, Appellant.

Dated, Detroit, Michigan, April 16, 1936.

[fol. 17] IN UNITED STATES DISTRICT COURT

GROUNDS OF APPEAL—Filed April 18, 1936

I

The court erred in refusing to grant a mistrial when the Assistant United States District Attorney asked Clifford Coffman and Thomas Hewson, two Government witnesses, who were also defendants, if the defense had subpœnaed the books and records of the Federal Warehouse Company.

II

The court erred in examining the jury upon the voir dire as to the defendants, Clifford Coffman and Thomas Hewson, where as a matter of fact the defendants, Clifford Coffman and Thomas Hewson were not actually tried, nor was a severance granted, the effect being to prejudice the jury.

III

The court erred in allowing the Government to withdraw from trial the defendants, Clifford Coffman and Thomas Hewson, after the jury had been sworn.

IV

The court erred in allowing the Government to subpœna Clifford Coffman and Thomas Hewson without first proving the corpus delicti of the alleged crime.

V

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without an instruction as to the difference between subpœnaing a witness and summoning a defendant for trial.

VI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without a proper severance being requested by the Government and a proper order being entered by this court upon such request.

VII

The court erred in its charge to the jury in that it failed to properly define charges set forth in the indictment.

VIII

The court erred in refusing to consolidate the four counts in the indictment to one general count, the alleged viola-
[fol. 18] tion of the four separate statutes involved, constituting but one crime.

IX

The court erred in its additional instructions to the jury by failing to apprise the defense of the instructions requested by the jury and in not asking counsel if there were any exceptions thereto.

X

The court erred in giving additional instructions to the jury by drawing an analogy between a robbery of a post office in the City of Detroit and the conspiracy to violate the law herein in question.

XI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury before they had entered a plea of guilty to the conspiracy in this cause, or had been convicted of conspiracy in this cause.

XII

The court erred in allowing the Government to subpœna Clifford Coffman and Thomas Hewson, and to demand testimony from Clifford Coffman and Thomas Hewson before the Government had established the corpus delicti of this cause.

XIII

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without the specific instruction that the words or actions of one co-conspirator made or spoken by such co-conspirator in furtherance of the conspiracy is the act of all.

XIV

The court erred in allowing testimony of Clifford Coffman and Thomas Hewson to go to the jury over the objections of counsel.

XV

The court erred in allowing statements of certain alleged co-conspirators to go to the jury without proper instruction.

[fol. 19]

XVI

The court erred in refusing to rule upon request of defense counsel to have the Government produce and turn over to the defense counsel for the purpose of cross-examination, the statements made to the Government officers by certain Government witnesses, who were also defendants in this cause.

XVII

The court erred in allowing the admission of exhibits taken from the so-called Federal Warehouse, which the defense claims were taken illegally, and which evidence the defendant had moved to be suppressed.

XVIII

The Court erred in allowing the admission in evidence of certain exhibits which the defense claims were taken during the process of an illegal search at 4029 Milford, in violation of the defendant's constitutional rights, which evidence the defendant had moved to suppress.

XIX

The court erred in its failure to suppress the evidence seized from the Federal Warehouse and from 4029 Milford Street in the City of Detroit, in violation of the constitutional rights of the defendant.

XX

The court erred in not directing a verdict of not guilty to the first count of the indictment, the same not setting forth a violation of a statute or law of the Congress of the United States of America.

XXI

The court erred in sentencing this defendant in that the sentence was excessive for the reason that the defendant was convicted of but one crime and not four crimes.

[fol. 20] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF SAM FLEISHER

Name and Address of Appellant: Sam Fleisher, 8769 Russell, Detroit, Michigan.

Names and addresses of Appellant's Attorney: Alfred A. May, 1459 National Bank Bldg., Detroit, Mich. George S. Fitzgerald, 3123 Barlum Tower, Detroit, Mich. Arthur H. Ratner, 1109 Guaranty Bldg., Detroit, Mich. Donald B. Frederick, 1706 Dime Bank Bldg., Detroit, Mich.

Offense: Conspiracy to illegally possess a still and to make mash and distill spirits without paying the revenue required by law and to fail to give bond as required by the Revenue Act.

Date of Judgment: April 15th, 1936.

Brief description of sentence: Eight years at a Penitentiary to be designated by the Attorney General and $20,000.00 fine.

Name of Prison where now confined: The defendant is at present confined in the Federal Detention Farm, Milan, Michigan, awaiting transportation to a Penitentiary to be designated by the Attorney General, if bail will not be granted.

I, the above named defendant and appellant hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment and sentence above mentioned, on the grounds set forth below.

Sam Fleisher, Appellant.

Dated, Detroit, Michigan, April 16, 1936.

[fol. 21] IN UNITED STATES DISTRICT COURT

GROUNDS OF APPEAL—Filed April 18, 1936

I

The court erred in refusing to grant a mistrial when the Assistant United States District Attorney asked Clifford Coffman and Thomas Hewson, two Government witnesses who were also defendants, if the defendant had subpœnaed the books and records of the Federal Warehouse Company.

II

The court erred in examining the jury upon the voir dire as to the defendants, Clifford Coffman and Thomas Hewson, where as a matter of fact the defendants, Clifford Coffman and Thomas Hewson were not actually tried, nor was a severance granted, the effect being to prejudice the jury.

III

The court erred in allowing the Government to withdraw from trial the defendants, Clifford Coffman and Thomas Hewson, after the jury had been sworn.

IV

The court erred in allowing the Government to subpœna Clifford Coffman and Thomas Hewson without first proving the corpus delicti of the alleged crime.

V

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without an instruction as to the difference between subpœnaing a witness and summoning a defendant for trial.

VI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without a proper severance being requested by the Government and a proper order being entered by this court upon such request.

VII

The court erred in its charge to the jury in that it failed to properly define charges set forth in the indictment.

VIII

The court erred in refusing to consolidate the four counts in the indictment to one general count, the alleged violation [fol. 22] of the four separate statutes involved, constituting but one crime.

IX

The court erred in its additional instructions to the jury by failing to apprise the defense of the instructions re-

quested by the jury and in not asking counsel if there were any exceptions thereto.

X

The court erred in giving additional instructions to the jury by drawing an analogy between a robbery of a post office in the City of Detroit and the conspiracy to violate the law herein in question.

XI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury before they had entered a plea of guilty to the conspiracy in this cause or had been convicted of conspiracy in this cause.

XII

The court erred in allowing the Government to subpoena Clifford Coffman and Thomas Hewson, and to demand testimony from Clifford Coffman and Thomas Hewson before the Government had established the corpus delicti of this cause.

XIII

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without the specific instruction that the words or actions of one co-conspirator made or spoken by such co-conspirator in furtherance of the conspiracy is the act of all.

XIV

The court erred in allowing testimony of Clifford Coffman and Thomas Hewson to go to the jury over the objections of counsel.

XV

The court erred in allowing statements of certain alleged co-conspirators to go to the jury without proper instruction.

[fol. 23]

XVI

The court erred in refusing to rule upon request of defense counsel to have the Government produce and turn over to the defense counsel for the purpose of cross-examination the statements made to the Government officers by certain

Government witnesses, who were also defendants in this cause.

XVII

The court erred in allowing the admission of exhibits taken from the so-called Federal Warehouse, which the defense claims were taken illegally, and which evidence the defendant had moved to be suppressed.

XVIII

The court erred in allowing the admission in evidence of certain exhibits which the defense claims were taken during the process of an illegal search at 4029 Milford, in violation of the defendant's constitutional rights, which evidence the defendant had moved to suppress.

XIX

The court erred in its failure to suppress the evidence seized from the Federal Warehouse and from 4029 Milford Street in the City of Detroit, in violation of the constitutional rights of the defendant.

XX

The court erred in not directing a verdict of not guilty to the first count of the indictment, the same not setting forth a violation of a statute or law of the Congress of the United States of America.

XXI

The court erred in sentencing this defendant in that the sentence was excessive for the reason that the defendant was convicted of but one crime and not four crimes.

[fol. 24] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF JOSEPH STEIN

Name and address of Appellant: Joseph Stein, 296 E. Euclid, Detroit, Michigan.

Names and addresses of Appellant's Attorneys: Alfred A. May, 1459 National Bank Bldg., Detroit, Mich. George S. Fitzgerald, 3123 Barlum Tower, Detroit, Mich. Arthur H. Ratner, 1109 Guaranty Bldg., Detroit, Mich. Donald B. Frederick, 1706 Dime Bank Bldg., Detroit, Mich.

Offense: Conspiracy to illegally possess a still and to make mash and distill spirits without paying the revenue required by law, and to fail to give bond as required by the Revenue Act.

Date of Judgment: April 15, 1936.

Brief description of sentence: Joseph Stein: Eight years at a Penitentiary to be designated by the Attorney General and $20,000.00 fine.

Name of Prison where now confined: The defendant is at present confined in the Federal Detention Farm, Milan, Michigan, awaiting transportation to a Penitentiary to be designated by the Attorney General, if bail will not be granted.

I, the above named defendant and appellant, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment and sentence above mentioned, on the grounds set forth below.

Joseph Stein, Appellant.

Dated: Detroit, Michigan, April 16, 1936.

[fol. 25] IN UNITED STATES DISTRICT COURT

GROUNDS OF APPEAL—Filed April 18, 1936

I

The court erred in refusing to grant a mistrial when the Assistant United States District Attorney asked Clifford Coffman and Thomas Hewson, two Government witnesses, who were also defendants, if the defense had subpoenaed the books and records of the Federal Warehouse Company.

II

The court erred in examining the jury upon the voir dire as to the defendants, Clifford Coffman and Thomas Hewson, where as a matter of fact the defendants, Clifford Coffman and Thomas Hewson were not actually tried, nor was a severance granted, the effect being to prejudice the jury.

III

The court erred in allowing the Government to withdraw from trial the defendants, Clifford Coffman and Thomas Hewson, after the jury had been sworn.

IV

The court erred in allowing the Government to subpoena Clifford Coffman and Thomas Hewson without first proving the corpus delicti of the alleged crime.

V

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without an instruction as to the difference between subpoenaing a witness and summoning a defendant for trial.

VI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without a proper severance being requested by the Government and a proper order being entered by this court upon such request.

VII

The court erred in its charge to the jury in that it failed to properly define charges set forth in the indictment.

VIII

The court erred in refusing to consolidate the four counts in the indictment to one general count, the alleged violation [fol. 26] of the four separate statutes involved, constituting but one crime.

IX

The court erred in its additional instructions to the jury by failing to apprise the defense of the instructions requested by the jury and in not asking counsel if there were any exceptions thereto.

X

The court erred in giving additional instructions to the jury by drawing an analogy between a robbery of a post office in the City of Detroit and the conspiracy to violate the law herein in question.

XI

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury before

they had entered a plea of guilty to the conspiracy in this cause, or had been convicted of conspiracy in this cause.

XII

The court erred in allowing the Government to subpoena Clifford Coffman and Thomas Hewson, and to demand testimony from Clifford Coffman and Thomas Hewson before the Government had established the corpus delicti of this cause.

XIII

The court erred in allowing the testimony of Clifford Coffman and Thomas Hewson to go to the jury without the specific instruction that the words or actions of one co-conspirator made or spoken by such co-conspirator in furtherance of the conspiracy is the act of all.

XIV

The court erred in allowing testimony of Clifford Coffman and Thomas Hewson to go to the jury over the objections of counsel.

XV

The court erred in allowing statements of certain alleged co-conspirators to go to the jury without proper instruction.

[fol. 27]

XVI

The court erred in refusing to rule upon request of defense counsel to have the Government produce and turn over to the defense counsel for the purpose of cross-examination the statements made to the Government officers by certain Government witnesses, who were also defendants in this cause.

XVII

The court erred in allowing the admission of exhibits taken from the so-called Federal Warehouse, which the defense claims were taken illegally, and which evidence the defendant had moved to be suppressed.

XVIII

The court erred in allowing the admission in evidence of certain exhibits which the defense claims were taken during

the process of an illegal search at 4029 Milford, in violation of the defendant's constitutional rights, which evidence the defendant had moved to suppress.

XIX

The court erred in its failure to suppress the evidence seized from the Federal Warehouse and from 4029 Milford Street, in the City of Detroit, in violation of the constitutional rights of the defendant.

XX

The court erred in not directing a verdict of not guilty to the first count of the indictment, the same not setting forth a violation of a statute or law of the Congress of the United States of America.

XXI

The court erred in sentencing this defendant in that the sentence was excessive for the reason that the defendant was convicted of but one crime and not four crimes.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS AND FILE ASSIGNMENT OF ERRORS TO AND INCLUDING AUGUST 17, 1936, IN APPEAL OF HARRY FLEISHER—Filed May 7, 1936.

On reading and filing the stipulation and stenographers certificate,

It Is Hereby Ordered that the time for settling the Bill of Exceptions in this cause be and the same is hereby extended to and including August 17, A. D. 1936, and that the time for filing the Assignment of Errors be extended to the same date.

Arthur F. Lederle, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS AND FILE ASSIGNMENT OF ERRORS TO AND INCLUDING AUGUST 17, 1936, IN APPEAL OF SAM FLEISHER—Filed May 7, 1936

On reading and filing the stipulation and stenographers certificate,

It Is Hereby Ordered that the time for settling the Bill of Exceptions in this cause be and the same is hereby extended to and including August 17, A. D. 1936, and that the time for filing the Assignment of Errors be extended to the same date.

Arthur F. Lederle, United States District Judge.

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS AND FILE ASSIGNMENT OF ERRORS TO AND INCLUDING AUGUST 17, 1936, IN APPEAL OF JOSEPH STEIN—Filed May 7, 1936

On reading and filing the stipulation and stenographers certificate,

It Is Hereby Ordered that the time for settling the Bill of Exceptions in this cause be and the same is hereby extended to and including August 17, A. D. 1936, and that the time for filing the Assignment of Errors be extended to the same date.

Arthur F. Lederle, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS TO AND INCLUDING SEPTEMBER 15, 1936—Filed July 16, 1936

On reading and filing the stipulation for an extension of time in which to settle the bill of exceptions, and on good cause being shown therefore, and it appearing to this Court that the time for settling the bill of exceptions has not expired,

It Is Hereby Ordered that the time for settling the bill of exceptions in these appeals be and the same is hereby extended to and including the 15th day of September, A. D. 1936.

Arthur F. Lederle, United States District Judge.

[fol. 30] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS TO AND INCLUDING OCTOBER 12, 1936—Filed September 10, 1936

On reading and filing the stipulation for an extension of time in which to settle the bill of exceptions, and on good cause being shown therefore, and it appearing to this Court that the time for settling the bill of exceptions has not expired,

It Is Hereby Ordered that the time for settling the bill of exceptions in these appeals be and the same is hereby extended to and including the 12th day of October, A. D. 1936.

Arthur F. Lederle, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS TO AND INCLUDING JANUARY 2, 1937—Filed October 6, 1936

Upon reading and filing the stipulation, which contains the consent of the United States Attorney for the Eastern District of Michigan; and upon reading and filing the affidavit of Alfred A. May,

It Is Ordered that the time for settling the Bill of Exceptions in this cause, and the time for filing the Assignment of Errors, be and the same is hereby extended to and including January 2, A. D. 1937.

Arthur F. Lederle, District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed December 4, 1936

In the early part of the year 1936 the appellants herein and others were indicted in a conspiracy indictment, the first count charging that they did conspire to cause to be set up stills and distiller's apparatus without having the same registered with the Collector of Internal Revenue,

as required by law; and in furtherance of the above count sets forth the following overt acts: That Jack Selbin superintended the unloading and loading of a large quantity of sugar at the Guardian Transit Company in the City of Detroit on to-wit: the 10th day of April, 1935. Another overt act charges the defendant, Joseph Stein with unloading a large quantity of sugar at the Guardian Transit Company on to-wit the 11th day of April, 1935.

The indictment sets forth the second count, charging the appellants and other persons with conspiring to unlawfully, knowingly, willfully and feloniously making and fermenting and causing to be made and fermented large quantities of mash, wort and/or wash. As to this count the indictment sets forth various overt acts, to-wit: That the defendant Joseph Stein did on the 10th day of April, 1936, drive an Indiana truck, heavily laden, from the Guardian Transit Company in the City of Detroit, to the Federal Warehouse in the City of Detroit. Another overt act is set forth as follows: that the defendant, Jack Selbin, did on the 10th day of April, 1935, back a Ford V-8 Coupe and enter the premises of the Federal Warehouse in the City of Detroit. A further overt act sets forth that the defendant, Harry Fleisher, did on the 11th day of April, 1935, drive a Ford car to a point opposite the front entrance of a garage at 4029 Milford Street, Detroit, Michigan. A further overt act under this count sets forth that the defendant, John J. Gettleson did on or about the 1st day of December, 1935, lease and pay the first months rent for a portion of the Federal Warehouse located in the City of Detroit, Michigan. Another overt act under this count sets forth that the defendant, Harry Fleisher, did on or about the 1st of December, 1935, accompany the defendant, John J. Gettleson, to the Federal Warehouse in the City of Detroit, Michigan.

The indictment sets forth the third count, charging the appellants and others with conspiring to carry on the business of distillers without having given bond as required by the law, and with the intent on the part of the defendants to co-conspire to defraud the government of the United [fol. 32] States of America of the tax on the spirits which would be distilled by the said defendants and co-conspirators. Under the overt acts in furtherance of the above count in this conspiracy indictment, is set forth as follows: That the defendants, Jack Mankin and Harry Schonosky, on the

11th day of April, 1935, climbed through a small hole in the west wall of the premises known and described as the Federal Warehouse, located in the City of Detroit, Michigan; a further overt act under this count sets forth that on the 10th day of April, 1935 the defendant, Joseph Stein, drove an Indiana truck from the American Can Company, in the City of Detroit, to the garage at 4029 Milford Street, in the City of Detroit.

The Fourth Count in the indictment sets forth that the appellants, and others, unlawfully conspired to possess a large quantity of distilled spirits the immediate containers not having affixed thereto a stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue Tax imposed on said spirits, and that the said spirits were at 5620 Federal Street in the premises known as the Federal Warehouse, and also other gallons of the distilled spirits being found at 4029 Milford Street, Detroit, Michigan; all of which spirits not having on their immediate containers stamps as required by law. The overt acts in furtherance of the above count are set forth as follows: On the 8th day of April, 1935, the defendant Sam Fleisher, transported large quantities of sugar from a point in Cleveland, Ohio to the Federal Warehouse in the City of Detroit. Another overt act sets forth that during the late fall of 1934, or the first part of 1935, the defendant, Sam Wisotsky, constructed a cement block partition in the premises known as the Federal Warehouse.

On the 31st day of March, 1936, the defendants were tried before the Honorable Arthur F. Lederle, United States District Judge, and a jury. That during the progress of the trial the defendants moved to consolidate the four counts in the indictment into one count, claiming that the four counts constituted but one crime and one conspiracy. The trial court denied this motion to which an exception was taken.

That during the progress of the trial, testimony was offered to the following effect: That sometime during the month of October, 1934, John Gettleson went to the Federal Warehouse, located at 5620 Federal Street, Detroit, Michigan, and spoke to Mr. Coffman and Mr. Hewson, other defendants in this cause, stating that he, Gettleson, was [fol. 33] Mr. Warren, and that he was a real estate man doing business in the City of Detroit, stating that he had

some clients who were in the chemical manufacturing business under the name of Osborne Products Company, and that they desired to acquire a site for a place to manufacture chemicals. Mr. Gettleson, under the name of Warren, negotiated with Mr. Hewson and Mr. Warren, who were running this warehouse for a corporation, for the remainder of October; and that the negotiations for the rental of this place for the Osborne Company continued until the month of November, 1934.

While these negotiations were being carried on to the point where an agreement as to amount of space that the Osborne Company would take and the amount of money they would pay for it, Mr. Gettleson, under the name of Warren, brought to the Federal Warehouse two men whom he did not introduce. There was some testimony to the effect that these men were Jack Selbin and Harry Fleisher. There was some testimony that during the time that Mr. Gettleson was on these premises with the aforementioned parties, that they looked over the space about which Mr. Gettleson has previously spoken with Mr. Hewson. There were measurements made of the building to make sure that it was the right amount of space that they needed. While this was taking place there was some evidence showing that Harry Fleisher at times had a handkerchief near his face.

There was some testimony to show that Mr. Gettleson represented to Mr. Coffman and Mr. Hewson that the Osborne Products Company was going to operate a small manufacturing plant and it was necessary for them to make a small hole in the floor of this building. There was some evidence that there were arrangements to partition off a portion of the walls. There was also some evidence to show that after this agreement had been finally consummated that Harry Fleisher and Jack Selbin came to these premises on three or four occasions, and that thereafter Mr. Wisotsky and his brother, and a party known as Schonowsky, and a man by the name of Stein came to the premises, and a partition separating that portion of the warehouse which had been rented to the Osborne Products Company was built.

There was some evidence to show that the operators of the warehouse discussed with Mr. Selbin the matter of rent due, and that Mr. Selbin told Mr. Coffman and Mr. Hewson that he and his associates had given the money,

which was to be paid to the said warehouse, to the man known to them as Warren, advising the said parties that the [fol. 34] man's name wasn't Warren but John Gettleson. After a telephone call by Selbin, the defendant, Gettleson, brought the money over to Coffman and Hewson.

There was some testimony tending to show that the Guardian Transit Company transported a considerable amount of sugar, and that some of this sugar was delivered to the truck of the Guardian Transit Company by Sam Fleisher.

There was some testimony to show that the cartage of the sugar was paid in cash by Jack Selbin or Joseph Stein.

There was some testimony to show that these trucks of the Guardian Transit Company were followed by Government officers from Cleveland, Ohio, to the address of the Guardian Transit Company, and that these officers observed this sugar being loaded into automobiles belonging to some of the defendants, and that after the sugar was loaded into the cars it was transported to the Federal Warehouse in the City of Detroit, and there unloaded from those cars into the Federal Warehouse building.

There was some testimony to show that these men, or some of them, operated a garage at 4029 Milford Street, in the City of Detroit, and that this garage was a place where the trucks were stored that contained the sugar that had been delivered to the warehouse, and that the garage was used to store the alcohol that was manufactured by this still in the Federal Warehouse.

There was evidence to show that during the month of April, 1935, that the Federal Warehouse was visited by Federal officers with a search warrant, at which time they discovered in this portion of the premises which had been rented to some of the defendants, eight hundred gallons of fuel oil, a sixty-two hundred gallon still cooker, a five hundred gallon receiving vat, and two complete stills, together with other equipment, and that there was a considerable amount of alcohol found on the premises of the Federal Warehouse and the garage on Milford Street.

That in addition to the foregoing, men were found in the act of operating the still. That while this seizure was taking place there was at that time in the actual process of being transferred to the defendants, several loads of sugar belonging to the Guardian Transit Company.

There was also some evidence to the effect that while these trucks were on their way from Cleveland to Detroit, [fol. 35] they were overtaken by the defendant, Harry Fleisher, somewhere near the Michigan line, and that Mr. Fleisher advised these truck owners that he did not want to lose that sugar, that he wanted it to be taken to the garage of the Guardian Transit Company on Milford Street, and if anybody tried to pick them up to keep their mouths shut, and he gave them money to eat with and lay over a short time while he attempted to have his own trucks come out and release the sugar.

There was some evidence tending to show that there was a quantity of fuel oil which was brought to the Federal Warehouse.

That on the 8th day of April, A. D. 1936, the jury found the defendants, Harry Fleisher, Sam Fleisher, Joseph Stein and Jack Selbin guilty as charged, and John J. Gettleson guilty on Count One, but not guilty on the rest of the counts; and found the other defendants, not guilty.

That on the 15th day of April, A. D. 1936, the Honorable Arthur F. Lederle, United States District Judge for the Eastern District of Michigan, Southern division, sentenced the defendants, Harry Fleisher, Sam Fleisher and Joseph Stein, appellants in this cause, to serve two years on each of the four counts as charged in the indictment, to be served in a Federal Penitentiary to be designated by the Attorney General of the United States; and in addition thereto, fined each of the defendants Five Thousand ($5,000.00) Dollars on each count of the indictment.

That the appellants, in their assignments of error, have set forth that the court erred in sentencing and fining each of the defendants on four separate counts, whereas the appellants contend that the four counts of the indictment constitute but one conspiracy and but one crime, and that the four sentences constitute quadruple and excessive punishment in violation of the Constitution of the United States; and that the court erred in not consolidating the four counts of the indictment, for the same reasons, overruling defendants' motion to consolidate, to which exception was taken.

It Is Hereby Stipulated and Agreed by and between the United States of America and the appellants, Harry Fleisher, Sam Fleisher and Joseph Stein, by their respective counsel, that the foregoing constitutes the agreed statement

of facts upon which the brief in this cause shall be substantially predicated.

[fol. 36] Dated this 2nd day of December, A. D. 1936.

John C. Lehr, United States Attorney, by William G. Comb, District United States Attorney. Alfred A. May, Attorney for appellants.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed December 4, 1936

Come now the said Harry Fleisher, Sam Fleisher and Joseph Stein, by Alfred A. May and George Fitzgerald, their attorneys, defendants and appellants in the above entitled cause and file the following assignments of error upon which they will rely in the prosecution of the appeal taken in said cause from the judgments and sentences against them under the indictment herein which judgments and sentences were entered by this court on the 15th day of April A. D. 1936, and set forth the following assignments of error.

1. That the Court erred in refusing to consolidate the four counts in the indictment into one count, the alleged violations under the four counts constituting but one crime.

2. The Court erred in refusing to hold that there was but one offense committed and charged in the Indictment instead of four separate offenses.

3. That the Court erred in sentencing the defendants under each count in the indictment, instead of consolidating the counts and sentencing the defendants for but one crime.

4. That the Court imposed quadruple punishment upon the defendants in sentencing them to two years on each of the four counts of the indictment.

5. That the Court erred in failing to hold that there was but one conspiracy and not four separate conspiracies.

[fol. 37] 6. That the Court erred in sentencing the defendants four times for the one crime charged, that the same is in contravention of the Constitution of the United States and specifically of the cruel and unusual punishment clause

thereof and of the first—fourteenth Amendments thereof inclusive.

Whereof the said Harry Fleisher, Sam Fleisher and Joseph Stein, by their respective counsel, by reason of the errors aforesaid, pray that the said judgments and sentences against them, under the indictment herein, may be reversed and held for naught.

Alfred A. May, George Fitzgerald, Attorneys for Appellants.

IN UNITED STATES DISTRICT COURT

ORDER TO FILE ASSIGNMENTS OF ERROR AND FOR THE CLERK TO FORWARD RECORD OF PROCEEDINGS—Filed December 4, 1936

It appearing to this Court that the appeals taken in this cause are to be prosecuted upon the clerk's record of proceedings, and without a Bill of Exceptions,

It Is Hereby Ordered that the appellants file with the clerk of the United States District Court for the Eastern District of Michigan, Southern Division, within ten days of the date of this order, an assignment of errors, or assignments of error, and that the clerk shall promptly forward the same together with the record of the proceedings in this cause, including therein the indictment; defendants' plea and bond; verdict of the jury; sentence and judgment of the Court; notices of appeal and grounds of appeal; assignments of error; extensions of time in which to settle and file the Bill of Exceptions; Stipulation designating the contents of the record of appeal; the agreed statement of facts; and this order directing the clerk to forward the record; and [fol. 38] together with the same the clerk shall forward his certificate to the United States Circuit Court of Appeals, Sixth Judicial Circuit.

Arthur F. Lederle, United States District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEAL—Filed December 4, 1936

It is hereby stipulated and agreed by and between the appellants and the appellee by their respective counsel that

the appeals in this cause are to be prosecuted upon the clerk's record of the proceedings without a bill of exceptions and on the agreed statement of facts, and on the assignment of errors and that the record of proceedings be forwarded to the Circuit Court of Appeals for the Sixth Judicial Circuit; that the same shall contain the following papers and documents constituting the record of appeals:

1. Indictment.
2. Defendant's plea and bond.
3. Verdict of the Jury.
4. Sentence and judgment of the court.
5. Notices of appeal and grounds of appeal.
6. Assignment of errors.
7. Extension of time to settle and file the bill of exceptions, etc.
8. Stipulation designating the contents of the record of appeal.
9. Agreed statement of facts.
10. Order directing clerk of District Court to forward record.

John C. Lehr, United States District Attorney, by Fred R. Walker, Assistant United States Attorney. Alfred A. May, Attorney for appellants.

[fols. 39-40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY, CAUSES ARGUED AND SUBMITTED—May 11, 1937

Before Hicks, Allen and Martin, JJ.

These causes are argued by Arthur H. Ratner, Donald Frederick and George S. Fitzgerald for Appellants, and by Fred Walker and Louis Hopping for Appellee and are submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—No. 7383—Filed June 3, 1937

Appeal from the District Court of the United States for the Eastern District of Michigan

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—No. 7384—Filed June 3, 1937

Appeal from the District Court of the United States for the Eastern District of Michigan

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—No. 7385—Filed June 3, 1937

Appeal from the District Court of the United States for the Eastern District of Michigan

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Nos. 7383-4-5—Filed June 3, 1937

Before Hicks and Allen, Circuit Judges, and Martin, District Judge

ALLEN, Circuit Judge:

Appellants were jointly indicted with others, in a single indictment which contained four counts, for conspiring (1) unlawfully to possess certain unregistered apparatus for the production of distilled spirits; (2) unlawfully to make and ferment mash in an unregistered distillery; (3) unlawfully to carry on the business of distillers without giving bond as required by statute, and (4) unlawfully to possess distilled spirits in unstamped containers. The substance of the four counts is set forth more fully in the margin.[1]

[1] Count 1 of the indictment charged that appellants and others from October 1, 1934, to and including the time of the filing of the indictment, unlawfully conspired together to possess and cause to be possessed, certain stills and distilling apparatus for the production of distilled spirits, and to cause the same to be set up without having the same registered with the Collector of Internal Revenue, as required by law. The second count charged that between October 1, 1934, and the date of the filing of the indictment, appellants unlawfully conspired together to make and ferment, and cause to be made and fermented, large quantities of mash in a building and on premises not duly authorized and designated according to law as a distillery. Count 3 charged that appellants, between October 1, 1934, and the date of the filing of the indictment, unlawfully conspired together to carry on the business of distillers without having given bond, as required by law, and with the intent on their part to defraud the United States Government of the tax on the spirits to be distilled. Count 4 charged that between October 1, 1934, and the date of the filing of the indictment, appellants unlawfully conspired together to possess a large quantity of distilled spirits, namely, 775 gallons, at 5620 Federal Street, Detroit, Michigan, and 1,500 gallons at 4029 Milford Street, Detroit, Michigan, the immediate containers thereof not having affixed thereto the stamp or stamps denoting the quantity of distilled spirits contained therein, and evidencing payment of all internal revenue taxes imposed on such spirits.

All appellants were convicted and separate fines and separate sentences of imprisonment were imposed under each of the four counts upon each of the appellants, the sentences being cumulative. The appeals present the single question, whether the sentences thus imposed constitute double punishment, and hence violate the Fifth Amendment to the Constitution of the United States.

Appellants contend that but one continuing conspiracy existed and that the counts charge one crime only, for which there can be but one punishment.

[fol. 44] We think that the judgments must be affirmed because each count charges a separate statutory offense.

While the acts of unlawfully setting up a still, unlawfully manufacturing mash, unlawfully dealing in distilled liquors, and unlawfully possessing such liquors, are often interrelated, the Congress has specifically provided that these acts shall constitute different offenses (Title 26, Sections 1152a, 1162, 1184, 1185, U. S. C.), and there is nothing in the Constitution which prevents the Congress from punishing separately each step leading to the consummation of the transaction which it has power to prohibit, and punishing also the completed transaction. Albrecht v. United States, 273 U. S. 1, 11.

The four counts are identical as to time, but the period covered is over twelve months, and different overt acts are set forth in support of each count of the indictment. The appeal is prosecuted under Rule 8 of the Rules of Practice and Procedure in criminal cases brought in the District Courts, promulgated May 7, 1934, and the record therefore contains no bill of exceptions. Unless the indictment upon its face shows that there was but one offense, since appellants were found guilty upon all four counts, we assume that testimony was offered showing the existence of four separate conspiracies. While many of the same facts may have been relied on to support the verdict on each count, this circumstance does not establish appellants' contention. As a matter of law each of the offenses charged was separate and distinct. Cf. Burton v. United States, 202 U. S. 344.

A single act may be an offense against two statutes, and if each statute requires proof of some fact which the other does not, an acquittal or conviction upon either statute does not exempt the accused from prosecution and punishment

under the other. Blockburger v. United States, 284 U. S. 299, 304. In that case the question was whether the same act, namely, a sale of narcotics, constituted two offenses: (1) that of selling the forbidden drugs except in or from the original stamped package, and (2) that of selling any such drugs not in pursuance of a written order of the person to whom the sale was made. It was held that although there was but one sale, two offenses were committed, and that the test to be applied to determine whether there are [fol. 45] two offenses or only one is whether conviction for each offense requires proof of a fact which the other does not. Here totally separate and distinct acts are charged. The same proof would not necessarily establish these separate charges. A conspiracy to set up an unregistered still could be proved without presentation of evidence of the conspiracy to manufacture mash, and vice versa. This is true as to a conspiracy to operate a still without giving bond, and unlawfully to possess unstamped containers of liquor. Certain entirely distinct elements are required to establish the conspiracy described in each count, and hence four distinct offenses are charged. Yenkichi Ito v. United States, 64 Fed. (2d) 73, 77 (C. C. A. 9); Parmenter v. United States, 2 Fed. (2d) 945 (C. C. A. 6); King v. United States, 31 Fed. (2d) 17 (C. C. A. 9); Leonard v. United States, 18 Fed. (2d) 208, 213 (C. C. A. 6); Pollock v. United States, 35 Fed. (2d) 174, 175 (C. C. A. 4); Piquett v. United States, 81 Fed. (2d) 75, 79 (C. C. A. 7); Slade v. United States, 85 Fed. (2d) 786 (C. C. A. 10); Chrysler v. Zerbst, 81 Fed. (2d) 975 (C. C. A. 10); United States v. Wexler, 79 Fed. (2d) 526, 528 (C. C. A. 2). It is significant that different overt acts were charged under each of the four counts of the indictment. Cf. Piquett v. United States, supra. The District Court did not err in imposing separate fines and requiring that the sentences upon all four counts run consecutively. The offenses were separate, and no double punishment exists.

The judgments are affirmed.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 202

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question whether the first count of the indictment states an offense under federal law.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

[fol. 48] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 203

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question whether the first count of the indictment states an offense under federal law.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 204

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question whether the first count of the indictment states an offense under federal law.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: Enter Isidore G. Stone. File Nos. 41, 683, 41, 684, 41, 685. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 202. Harry Fleisher, petitioner, vs. The United States of America. Term No. 203. Sam Fleisher, petitioner, vs. The United States of America. Term No. 204. Joseph Stein, petitioner, vs. The United States of America. Petition for writs of certiorari and exhibit thereto. Filed July 8, 1937. Term Nos. 202, O. T., 1937, 203, O. T., 1937, 204, O. T., 1937.

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Nos. 202, 203, 204

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CLERK

In The

Supreme Court of the United States

October Term, 1937.

No.

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ISADORE G. STONE,
302 Federal Reserve Building,
Detroit, Michigan,
Counsel for Petitioners.

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In The

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October Term, 1937.

No. . . . . .

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I. Summary Statement Of the Matter Involved.

(Figures in parenthesis refer to pages of the printed record, except as the context clearly indicates otherwise.)

On October 30, 1935, the petitioners herein, and others, were jointly indicted in a conspiracy indictment contain-

ing four counts (1). The first count of the indictment charges that the defendants did conspire to cause to be set up stills and distilling apparatus for the production of distilled spirits, without having the same registered with the Collector of Internal Revenue (2). As overt acts under this count the indictment sets forth that Jack Selbin superintended the unloading and loading of a large quantity of sugar at the Guardian Transit Company in the city of Detroit, on, to-wit, the 10th day of April, 1935, and that Joseph Stein unloaded a large quantity of sugar at the Guardian Transit Company on, to-wit, the 11th day of April, 1935 (2, 3, 31).

The second count charges the appellants and other persons with conspiring to unlawfully, knowingly, wilfully and feloniously making and fermenting and causing to be made and fermented a large quantity of mash, wort and/or wash. As overt acts under this count, the indictment sets forth that the defendant, Joseph Stein, on the 10th day of April, 1935, drove an Indiana truck, heavily laden, from the Guardian Transit Company in the city of Detroit, to the Federal Warehouse in the city of Detroit (4, 31). The indictment sets forth another overt act under this count to the effect that the defendant, Jack Selbin, did on the 10th day of April, 1935, back a Ford V-8 coupe and enter the premises of the Federal Warehouse in the city of Detroit. It is set up as a further overt act under this count, that the defendant, Harry Fleisher, did on the 11th day of April, 1935, drive a Ford car to a point opposite of the front entrance of a garage at 4029 Milford Street, Detroit, Michigan (4, 31). It sets forth another overt act that the defendant, John J. Gettleson, did on or about the first of December, 1935, lease and pay the first month's rent for a portion of the premises known as the Federal Warehouse located in

Detroit, Michigan (4, 31). It sets forth another overt act under this count to the effect that the defendant, Harry Fleisher, did on or about the 1st of December, 1935, accompany defendant, John J. Gettleson, to the Federal Warehouse (5, 31).

The third count of the indictment charges the appellants, and others, with conspiring to carry on the business of distillers without having given bond as required by law, and with the intent on the part of appellants to co-conspire to defraud the Government of the tax on spirits which would be distilled by the said appellants and co-conspirators (5, 31, 32). As overt acts in furtherance of this count the following is set forth: That defendants, Jack Mankin and Harry Schonowsky on the 11th day of April, 1935, climbed through a small hole in the west wall of the premises known as the Federal Warehouse. It sets forth another overt act, that on the 10th day of April, 1935, Joseph Stein drove an Indiana truck from the American Can Company to the garage at 4029 Milford Street (6, 32).

The fourth count in the indictment sets forth that the appellants, and others unlawfully conspired to possess a large quantity of distilled spirits, the immediate containers not having affixed thereto a stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of the Internal Revenue Tax imposed on the said spirits (6, 7, 32). The overt acts relied on under this count set forth as follows: That on the 8th day of April, 1935, the defendant, Sam Fleisher, transported sugar from a point in Cleveland, Ohio, to the Federal Warehouse in Detroit, Michigan (7, 32). It sets forth another overt act, that during the late fall of 1934 or during the first part of 1935, Sam Wisotsky, constructed

a cement block partition in the Federal Warehouse (7, 32).

The 31st day of March, A. D. 1936, the defendants were tried before the Honorable Arthur F. Lederle, United States District Judge for the Eastern District of Michigan, Southern Division, and a jury (32). During the progress of the trial the defendants moved to consolidate the four counts in the indictment into one count, claiming that the four counts constitute but one crime and but one conspiracy. The trial court denied this motion and exception was taken (32).

The appellants, Harry Fleisher, Sam Fleisher, Joseph Stein and Jack Selbin, appealed this cause to the Circuit Court of Appeals for the Sixth Judicial Circuit, and in their assignments of error have set forth that the trial court erred in sentencing to imprisonment and fining each of the defendants on each of the four separate counts of the indictment, and compelling them to serve these sentences consecutively, for the reason that the four separate sentences thus to be served constituted excessive punishment in violation of the United States Constitution, for the reason that the four counts in the indictment constitute but one crime and one conspiracy, and that count three comprises counts one, two and four as component elements thereof.

On June 3, 1937, the Circuit Court of Appeals sustained the judgment of the District Court (41, 43, 45), saying:

> "A single act may be an offense against two statutes, and if each statute requires proof of some fact which the other does not, an acquittal or conviction upon either statute does not exempt the accused from prosecution and punishment under the other. *Block-*

burger v. United States, 284 U. S. 299, 304. In that case the question was whether the same act, namely, a sale of narcotics, constituted two offenses: (1) that of selling the forbidden drugs except in or from the original stamped package, and (2) that of selling any such drugs not in pursuance of a written order of the person to whom the sale was made. It was held that although there was but one sale, two offenses were committed, and that the test to be applied to determine whether there are two offenses or only one is whether conviction for each offense requires proof of a fact which the other does not. Here totally separate and distinct acts are charged. The same proof would not necessarily establish these separate charges. A conspiracy to set up an unregistered still could be proved without presentation of evidence of the conspiracy to manufacture mash, and vice versa. This is true as to a conspiracy to operate a still without giving bond, and unlawfully to possess unstamped containers of liquor. Certain entirely distinct elements are required to establish the conspiracy described in each count, and hence four distinct offenses are charged. *Yenkichi Ito v. United States, 64 Fed. (2d) 73, 77 (C. C. A. 9); Parmenter v. United States, 2 Fed. (2d) 945 (C. C. A. 6); King v. United States, 31 Fed. (2d) 17 (C. C. A. 9); Leonard v. United States, 18 Fed. (2d) 208, 213 (C. C. A. 6); Pollock v. United States, 35 Fed. (2d) 174, 175 (C. C. A. 4); Piquett v. United States, 81 Fed. (2d) 75, 79 (C. C. A. 7); Slade v. United States, 85 Fed. (2d) 786 (C. C. A. 10); Chrysler v. Zerbst, 81 Fed. (2d) 975 (C. C. A. 10); United States v. Wexler, 79 Fed. (2d) 526, 528 (C. C. A. 2).* It is significant that different overt acts were charged under each of the four counts of indictment. *Piquett v. United States, supra.* The District Court did not err in imposing separate fines and requiring that the sentences upon all four counts run consecutively. The offenses were separate, and no double punishment exists."

II. Reason Relied On For Allowance Of the Writ.

1. That the Circuit Court of Appeals rendered a decision in conflict with the decisions of another Circuit Court of Appeals in the same matter.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court.

3. That the Circuit Court of Appeals had decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

4. That the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be settled by this court.

Prayer For Writ.

Wherefore, your petitioners, Harry Fleisher, Sam Fleisher and Joseph Stein, jointly and separately, pray that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record of the proceedings of said court had in these cases numbered 7383, Harry Fleisher, Appellant, v. United States of America, Appellee; 7384, Sam Fleisher, Appellant, v. United States of America, Appellee; 7385, Joseph Stein versus United States of America, Appellee; to the

end that these causes may be reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals be reversed and for such further relief as to this Court may seem proper.

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In The

Supreme Court of the United States

October Term, 1937.

No. . . . . .

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF HARRY FLEISHER, SAM FLEISHER AND JOSEPH STEIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

Opinion Of Court Below.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (43), has not been recorded.

II.

Jurisdiction.

1. Judgment of the United States Circuit Court of Appeals, a review of which is hereby sought, was entered June 3, A. D. 1937 (43).

2. The statutory provision which is relied upon to sustain the jurisdiction of this court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.) and the Fifth and Eighth Amendments to the Constitution of the United States.

III.

Statement Of the Case.

The statement in the Petition for Writ of Certiorari, under I, pages 1-5, is hereby adopted and made a part of this brief without further elaboration.

IV.

Specification Of Error.

Petitioners intend to urge and rely upon the errors assigned in their Assignment of Errors in the District

Court (36-37), a succinct analysis of which is: That the court erred in sentencing the defendants to serve consecutively four sentences based upon the four counts of the indictment, all of which four counts constitute but one conspiracy and one crime, and that the sentences thus imposed were in contravention of the Constitution of the United States and especially of the cruel and unusual punishment clause thereof contained in the Eighth Amendment to the United States Constitution and of the Fifth Amendment, constituting double jeopardy and violation of the due process clause thereof.

V.

ARGUMENT.

Point I.

That the Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter.

Count Three of the indictment (5) charges the petitioners in this proceeding, together with others, with conspiring to carry on the business of distillers without having given bond as required by law. The Petition for Writ of Certiorari to review the proceedings of the court below is based upon the contention that Count Three contains as component elements Counts One, Two and Four (1-8); it being contended that the business of a distiller includes the setting up of a still, the making of mash, and the business of distilling spirits.

> *Tritico v. United States, 4 Fed. (2d) 664 (C. C. A. 5).*

In *Morgan v. United States, 294 Fed. 182 (C. C. A. 4)*, the court said, on page 184:

> "Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designated for the manufacture of moonshine whisky, charged in counts one and two of the same

indictment. The act charged as a crime in count three included acts charged as crimes in counts one and two. It follows that the sentence under counts one and two must be set aside, as was properly conceded by the United States Attorney * * *."

Woods v. United States, 26 Fed. (2d) 63 (C. C. A. 8);

Murphy v. United States, 285 Fed. 801 (C. C. A. 7);

United States v. Mozzochi, 75 Fed. (2d) 497 (C. C. A. 2).

It is obvious from a reading of the indictment (1-8) that the Government's theory in the trial court was that the four counts constituted but one conspiracy, otherwise irrelevant overts would not have been placed under several of the counts in the indictment.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this court.

It has been repeatedly held by this court that where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. It is fundamental that the Government has not the right to split up a single transaction into a plurality of separate indictable and punishable offenses.

In re Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

In re Snow, 120 U. S. 274, in which the court said:

> "It is to prevent such an infliction of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution; prior to the time the prosecution is instituted."

Point III.

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

There is now doubt that the weight of authority applies the "same transaction test." It is equally true, however, that Federal courts have applied the same evidence test. It has been held in the Sixth Judicial Circuit, in which the rule is applied that the two offenses must be in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case then the one crime must be an ingredient of the other.

It has thus been held that a defendant arrested under the National Prohibition Law could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors, and the other the possession of implements and materials designed for manufacture of such liquor, where the manufacture was the dominant feature of the first count.

Reynolds v. United States, 280 Fed. 1 (C. C. A. 6);
Krench v. United States, 42 Fed. (2d) 354;

Sprague v. Aderholt-Warden, 45 Fed. (2d) 790;
Tritico v. United States, supra;
Morgan v. United States, supra;
Woods v. United States, supra;
Murphy v. United States, supra;
United States v. Mozzochi, supra;
In re Nielson, supra;
In re Snow, supra.

Point IV.

That the Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this court.

Petitioners respectfully contend that they do not believe that there is a case which has been decided in the United States Supreme Court in which the specific question of conspiracy has been considered with relation to the question of excessive punishment herein involved. It is true that in the Eighth Circuit Court of Appeals it has been held that the conspiracy to forge constituted a different and separate count from the conspiracy to utter, as was held in *Beddow v. Unied States, 70 Fed. (2d) 674 (C. C. A. 8)*, but the analogy of that case does not touch the facts in the case at bar. It is contended that had there been two conspiracy indictments, one to illegally distill and manufacture liquor, and two, a conspiracy to sell the liquor, there might be some basis for the analogy. This, however, does not apply to the case at bar for the reason that the illicit distilling of liquor contains as ingredients or component elements the other three counts. The same is true of *Parmenter v. United States, 2 Fed. (2d) 945.*

The maximum sentence that could be imposed in this case is set out in *18 U. S. C. A., Sec. 88:*

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand ($10,000.00) dollars, or imprisoned not more than two years, or both."

CONCLUSION.

We respectfully urge that the sentences of the petitioners are excessive and that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing the decision of the United States Circuit Court of Appeals for the Sixth Judicial Circuit.

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ALFRED A. MAY,
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GEORGE FITZGERALD,
Of Counsel for Petitioners.

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In The

Supreme Court of the United States

October Term, 1937.

No. .....

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Opinions Below.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 35-37) has not yet been reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered June 3, 1937 (R. 34). The petition for writs of

certiorari was filed July 8, 1937. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28, U. S. C. A); also Rule XI of the Criminal Appeals Rules promulgated by this court May 7, 1934.

Order allowing certiorari filed October 11, 1937 (R. 38).

Question Presented.

Whether the first count of the indictment states an offense under Federal Law.

Statement Of the Case.

Petitioners were indicted with others, in the District Court of the United States for the Eastern District of Michigan on four counts of an indictment, the question involved in this case being limited to the first count. The first count of the indictment charges that from October 1, 1934 to including the time of filing indictment, the defendants unlawfully conspired together to possess, and cause to be possessed certain stills and the distilling apparatus for the production of distilled spirits, and to cause the same to be set up without having the same registered with the Collector of Internal Revenue as required by law (R. 1-2).

Appellants were convicted on count one together with the other counts in the indictment (R. 9-11) and each was sentenced to two years imprisonment and to pay a fine of

$5000.00 on each count, the prison sentences to run consecutively and the fines to be cumulative (R. 9-11). Separate appeals were taken to the Circuit Court of Appeals for the Sixth Circuit (R. 12-23), and the convictions and sentences were there affirmed (R. 34).

ARGUMENT.

The brief on behalf of the Government sets up *in limine,* and points out, for the first time in this cause: "that the first count in the indictment charged that the object of the conspiracy was a failure to register certain stills with the Collector of Internal Revenue, whereas the charge should be that the object of the conspiracy was a failure to register the stills with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue, as required by law and regulations." Appellants are in accord with the brief of the Government, and file this brief in the hope that the additional authorities herein cited may be of some assistance to this court.

1. It is admitted that this point was not raised in the courts below, nor was it mentioned in the petition for writs of certiorari, or in the supporting brief. It has been held that this question is one arising upon the face of the record and may undoubtedly be considered by this court.

United States v. Atkinson, 297 U. S. 157, 160;
New York Central R. Company v. Johnson, 279 U. S. 310, 318;
Brasfield v. United States, 272 U. S. 448, 450;
Wilborg v. United States, 163 U. S. 632 et seq.;
Cliyatt v. United States, 197 U. S. 207, 220 et seq.;
Crawford v. United States, 212 U. S. 183, 194;
Weems v. United States, 217 U. S. 349, 362.

Though *Paraiso v. United States, 207 U. S. 368,* seems to be contra to the above cases, *Weems v. United States, 217 U. S. 349, 362,* cites *Paraiso v. United Stats, supra,* and holds with the above authorities. Though the *United States v. Dibella, 28 F. (2d) 805 (C. C. A. 2),* seems to be the other authority to some extent not in accord with the foregoing; it is distinguished in *Connley v. United States, 46 F. (2d) 63 (C. C. A. 9).*

2. The law seems to be well settled that a charge of failure to register a still with the Collector of Internal Revenue states no offense. The brief of the United States on page 5 cites numerous authorities which are clearly to this effect. In the appendix attached hereto, we have set forth the note to *Benton v. United States, 80 F. (2d) 162 (C. C. A. 4)* which note very aptly traces the history of the various acts and the executive order which created the duty to register stills with the District Supervisor of the Alcohol Tax Unit, so that failure to register stills with the Collector of Internal Revenue could not be the basis of a charge of crime. In addition thereto set forth in the appendix will be found excerpts from the various acts and executive order and regulations involved in this question.

See also:

United States v. Stafoff, 260 U. S. 477;
Rossi v. United States, 60 F. (2d) 995.

3. Another question raised in the brief on behalf of the Government is that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite, and it would seem that the term of imprisonment on count two should commence

from the date fixed by the judgment of the court below (R. 9-12) and imprisonment to begin under the sentence on the first count, should the first count be reversed by this court.

Blitz v. United States, 153 U. S. 308.

CONCLUSION.

It is the contention of appellants that the sentences and judgments of the District Court as to count one should be reversed and that the sentences of imprisonment should be amended and the remaining counts should commence with count two commencing *nunc pro tunc* as of the date of the sentences, to-wit, April 15, 1936.

Respectfully submitted,

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APPENDIX.

BENTON v. UNITED STATES, 80 FEDERAL REPORTER, 2D SERIES, PAGES 163-164, NOTES.

Registration of Stills.

The Reorganization Act of March 3, 1927, Section 1, 44 Stat. 1381, 5 U. S. C. A., § 281, created a bureau in the Treasury Department to be known as the Bureau of Prohibition, with a Commissioner of Prohibition at its head. Sections 4 and 5 of the act, 5 U. S. C. A., § 281-c and 281-d, provided that the rights and duties conferred upon the Commissioner of Internal Revenue and his assistants by any law in respect, inter alia, to the production of intoxicating liquors, should be transferred to and imposed upon the Secretary of the Treasury; and the Secretary was authorized to confer or impose any of such rights and duties upon the Commissioner of Prohibition or Commissioner of Internal Revenue or their respective assistants. On April 1, 1927, the Secretary issued Bureau of Prohibition Treasury Decision No. 1 (see Regulations 2 relating to permits promulgated April 1, 1931, p. 219), which provided in paragraph IV (2) (a) that there should be conferred and imposed upon the Commissioner of Prohibition all the rights and duties conferred or imposed upon the Commissioner of Internal Revenue by any law insofar as they related to the production of distilled spirits. Thereby the duty of registering stills was delegated to the Commissioner of Prohibition. Shortly after the passage of the Reorganization Act, District Prohibition Administrators were appointed, and the duty of registering stills was imposed

upon them. This action was confirmed by Article 18 of Regulations No. 3 relative to industrial alcohol promulgated by the Treasury Department on October 1, 1927.

The Prohibition Reorganization Act of May 27, 1930, 46 Stat. 427, 27 U. S. C. A., §§ 101 to 108, created a Bureau of Prohibition in the Department of Justice, with a Director of Prohibition at its head, and transferred certain duties with reference to the enforcement of the prohibition laws from the Secretary of the Treasury to the Attorney-General. The registration of stills was not taken away, but remained with the Secretary of the Treasury. Section 5 of the act, 27 U. S. C. A., § 105, however, provided for the repeal of regulations in force prior to July 1, 1930, and the issuance of new regulations by the Attorney-General and the Secretary of the Treasury, with regard, amongst other things, to the form of all applications. Thereupon, Bureau of Prohibition Treasury Decision 54, effective July 1, 1930, was promulgated whereby the duties of prohibition administrators within their respective districts were transferred to supervisors of permits, and Regulations No. 3, relative to industrial alcohol, effective April 1, 1931, provided by Article 14 that every person having in his possession or custody any still should register the same in quadruplicate with the supervisor of the district in which it was set up, and Article 4 (p) provided that "supervisor" should mean the supervisor of permits in the Bureau of Industrial Alcohol.

Thereafter, by the Act of March 3, 1933, 47 Stat. 1517, 5 U. S. C. A., §§ 124 to 130, the President was empowered to regroup the agencies of the Government, and by Executive Order 6639, which became effective May 10, 1934, 5 U. S. C. A., § 132, note, the President directed that the Bureau of Industrial Alcohol and the office of the Commissioner of Industrial Alcohol should be abolished and

the rights and powers imposed upon him should be transferred to and held by the Commissioner of Internal Revenue. The order also provided that the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, should prescribe all regulations under the provisions of the National Prohibition Act and laws amendatory thereof, which had not been rendered inoperative by the repeal of the Eighteenth Amendment, relating to the form of all applications, etc. On May 10, 1934, the Commissioner of Internal Revenue, pursuant to this authority, issued Treasury Decision No. 4432 (Internal Revenue Bulletin, January-June, 1934, p. 534), of which paragraphs 1 and 2 created in the Bureau of Internal Revenue an Alcohol Tax Unit with a Deputy Commissioner at its head charged, inter alia, with administration of internal revenue laws relating to the production of distilled spirits. Paragraph 3 imposed upon the Deputy Commissioner in charge of the Alcohol Tax Unit, and his assistants, all the rights and duties conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue, under the provisions of Executive Order 6639 (5 U. S. C. A., § 132 note) and Section 4 (a) of the Reorganization Act of March 3, 1927 (5 U. S. C. A., § 281-c (a), insofar as they related to the duties to be performed under said paragraph 2. The rights and duties thus conferred upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Unit, included the right and duty to receive the registration of stills which had been imposed upon the supervisor of the district on July 1, 1930, and had remained with him until the abolition of the Bureau of Industrial Alcohol by Executive Order 6639 on May 10, 1934. Paragraph 4 of Treasury Decision 4432, however, provided that all regulations prescribed for the enforcement of the laws theretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol and his

assistants should continue in effect as regulations of the Bureau of Internal Revenue, and provided that the term "Supervisor or Supervisor of Permits," whenever used in such regulations, should be held to mean "District Supervisor." The effect of the decision, therefore, was that the power and duty of registering stills devolved upon the District Supervisor of the Alcohol Tax Unit, as the agent and assistant of the Deputy Commissioner of Internal Revenue. It is required that the registration of a still be made in quadruplicate, and that one copy be sent to the collector of internal revenue of the district, who continues to have jurisdiction over the collection of the tax. (See Regulations 8 concerning the manufacture of whisky, page 4.)

REORGANIZATION ACT OF MARCH 3rd, 1927.

(44 Stat. 1381.)

Chap. 348. An Act To Create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. * * *

Sec. 4. (a) The rights, privileges, powers and duties, conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eight-

eenth amendment, are hereby transferred to and conferred and imposed upon the Secretary of the Treasury.

(b) The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

Sec. 5. (a) The Secretary of the Treasury is authorized to transfer to the Bureau of Prohibition such records, property (including office equipment), and personnel of the office of the Commissioner of Internal Revenue as may be necessary for the exercise by the Bureau of Prohibition of the functions vested in it.

(b) The Commissioner of Prohibition, with the approval of the Secretary of the Treasury, is authorized to appoint in the Bureau of Prohibition such employees in the field service as he may deem necessary, but all appointments of such employees shall be made subject to the provisions of the civil service laws, notwithstanding the provisions of Section 38 of the National Prohibition Act, as amended. The term of office of any person who is transferred, under this section, to the Bureau of Prohibition, and who was not appointed subject to the provisions of the provisions of the civil service laws, expire upon the expiration of six months from the effective date of the Act.

* * *

PROHIBITION REORGANIZATION ACT OF MAY 27, 1930.

(46 Stat. 427.)

Chap. 342—An Act To transfer to the Attorney-General certain functions in the administration of the National Prohibition Act, to create a Bureau of Prohibition in the Department of Justice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Prohibition Reorganization Act of 1930."

• • •

Sec. 5. (a) The Attorney-General and the Secretary of the Treasury shall jointly prescribe all regulations under this Act and the National Prohibition Act relating to permits, and the form of all applications, bonds, permits, records and reports, under such Acts. *Provided, That all regulations relating to the Bureau of Prohibition in the Department of Justice shall be made by the Attorney-General.*

(b) Regulations in force prior to the effective date of the Act shall not be in force thereafter unless prescribed and issued in accordance with the provisions of paragraph (a) of this section; but the repeal of such regulations shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred thereunder. Nothing in this act shall affect the terms or conditions of any permit or bond given prior to the effective date of this Act.

• • •

U. S. TREASURY DEPARTMENT
BUREAU OF INDUSTRIAL ALCOHOL.
REGULATIONS NO. 3.
Relative to the Production, Tax Payment, etc., of INDUSTRIAL ALCOHOL and to the Manufacture, Sale and Use of DENATURED ALCOHOL.

Under Title III of the National Prohibition Act of October 28, 1919, Prescribed Jointly by the Secretary of the Treasury and the Attorney-General of the United States Under the Prohibition Reorganization Act of 1930.

Effective April 1, 1931.

REGULATIONS PRESCRIBED.

Article 1. Pursuant to the provisions of the National Prohibition Act, as amended and supplemented, the following regulations are prescribed to govern the manufacture and distribution of industrial alcohol, and the manufacture, sale, use and export of denatured alcohol:

* * *

REGISTRY OF STILLS.

Art. 14. Every person, including the proprietor of an industrial alcohol plant, having in his possession or custody, or under his control, any still or distilling apparatus set up, except retorts for the production of wood alcohol and glass laboratory stills of small capacity, shall register the same in quadruplicate on Form 26 with the supervisor of the district in which set up, except where such stills have heretofore been registered and no change in ownership, possession, custody, con-

trol, or location has occurred since such registry. The original copy of Form 26 will be retained by the supervisor for his files. One copy of the form will be forwarded to the commissioner, one copy with notation of receipt thereon will be returned by the supervisor to the registrant, and one copy will be sent to the collector of internal revenue of the district in which the still was manufactured. The registrant must retain the copy returned to him at the place of registration, so that the same will be available for inspection by visiting Government officers.

* * *

ACT OF MARCH 3rd, 1933.

(47 Stat. 1518.)

"Power of President.

"Sec. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by executive order—

"(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

"(b) Consolidate the functions vested in any executive agency; or

"(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

"(d) Designate and fix the name and functions of any consolidated activity or executive agency and the

title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof."

EXECUTIVE ORDER NO. 6639.

TRANSFER OF FUNCTIONS.

1. (a) The Bureau of Industrial Alcohol and the Office of Commissioner of Industrial Alcohol are abolished, and the authority, rights, privileges, powers and duties, conferred and imposed by law upon the Commissioner of Industrial Alcohol are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury.

(b) The authority, rights, privileges, powers and duties, conferred and imposed upon the Attorney-General by the Act of May 27, 1930 (ch. 343, 46 Stat. 427), entitled "An Act to transfer to the Attorney-General certain functions in the administration of the National Prohibition Act, to create a Bureau of Prohibition in the Department of Justice, and for other purposes," so far as they are required to, or may, be exercised and performed under existing law, are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury. *Provided,* That the Attorney-General shall continue to exercise the power and authority (a) to remit or mitigate forfeitures under the Internal Revenue laws and to determine liability for Internal Revenue taxes and penalties, in connection with the violations

of the National Prohibition Act occurring prior to the repeal of the eighteenth amendment, and (b) to institute suits upon any cause of action under the National Prohibition Act, or under the Internal Revenue laws involving a violation of the National Prohibition Act, arising prior to, and/or not affected by, the repeal of the eighteenth amendment, and to compromise any such cause of action before or after suit is brought. *And provided further,* That the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, shall prescribe all regulations under the provisions of the National Prohibition Act, and all laws amendatory thereof or supplementary thereto, which were not rendered inoperative by the repeal of the eighteenth amendment, relating to permits, and he shall prescribe the form of all applications, bonds, permits, records and reports, under such acts.

TRANSFER OF OFFICIAL RECORDS AND PROPERTY.

2. (a) The official records and papers on file in, and pertaining to the business of, the Bureau of Industrial Alcohol, together with the supplies, furniture, equipment, and other property of the United States in use in such Bureau, are transferred to the Bureau of Internal Revenue.

(b) The official records and papers on file in the Department of Justice pertaining to the functions transferred by this order to the Commissioner of Internal Revenue, together with supplies, furniture, equipment, and other property of the United States in use in said Department in connection with the performance of such functions, are transferred to the Bureau of Internal Revenue.

TRANSFER OF PERSONNEL.

3. (a) The officers and employees employed in, or under the jurisdiction of, the Bureau of Industrial Alcohol, are transferred to the Bureau of Internal Revenue, without change in classification of compensation.

(b) The officers and employees employed in, or under the jurisdiction of, the Alcohol Beverage Unit of the Division of Investigation, Department of Justice, except those employed in, or under the jurisdiction of, the taxes and penalties section of said Unit, are transferred to the Bureau of Internal Revenue without change in classification or compensation.

(c) Officers and employees transferred to the Bureau of Internal Revenue hereunder, who do not already possess a competitive classified civil service status, shall not acquire such status by reason of such transfer, except upon recommendation by the Secretary of the Treasury to the Civil Service Commission, subject to such noncompetitive tests of fitness as the commission may prescribe; and no officer or employee so transferred may be retained in the Bureau of Internal Revenue without appropriate civil service status for a period longer than 60 days from the effective date of this order.

TRANSFER OF APPROPRIATIONS.

4. The unexpended balances of appropriations for the Bureau of Industrial Alcohol and the field service thereunder, and the unexpended balances of the appropriations made for salaries and expenses, Bureau of Prohibition, Department of Justice including the field service thereof, insofar as may be required for the performance of the functions transferred by this order to the Commissioner of Internal Revenue shall be transferred on the books of the Treasury Department to the

appropriation entitled "Collecting the Internal Revenue," which shall thereafter be available in the Bureau of Internal Revenue as a single fund for expenditure for the purposes named in the laws making the separate appropriations for "Salaries and Expenses, Bureau of Industrial Alcohol, Treasury Department," "Salaries and Expenses, Bureau of Prohibition, Department of Justice" and "Collecting the Internal Revenue," respectively; and appropriations, if any, made to the Bureau of Industrial Alcohol and the Department of Justice, respectively, for the fiscal year 1935, for the performance of the functions transferred by this order to the Bureau of Internal Revenue, shall likewise be transferred on the books of the Treasury Department to the appropriation "Collecting the Internal Revenue," subject to the conditions herein set forth.

GENERAL PROVISIONS.

5. Executive Orders Numbered 6166, 6224 and 6540, dated June 10, 1933, July 27, 1933, and December 28, 1933, respectively, are revoked insofar as they are in conflict with the provisions of this order.

6. This order shall take effect upon the sixty-first calendar day after its transmission to Congress, unless otherwise determined in accordance with law. (Promulgated March 10, 1934, pursuant to Section 126 of Title 5.)

(T. D. 4432)

Alcohol Tax Unit.

Establishing An Alcohol Tax Unit in the Bureau of Internal Revenue, and Defining Its Jurisdiction.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.

Washington, D. C.

To Officers and Employees of the Bureau of Internal Revenue, Collectors of Internal Revenue, and Others Concerned:

1. There is hereby established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, at the head of which shall be a Deputy Commissioner of Internal Revenue appointed as required by law.

2. The Alcohol Tax Unit shall be charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids.

(b) The establishment, construction, operation, custody and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded-wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored.

(c) The determination, assertion and assessment of all internal revenue taxes and penalties pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, and the compromise thereof, except that all moneys shall be received and accounted for by the collectors of internal revenue under the direction of the Commissioner of Internal Revenue.

(d) Inquiries and investigations relating to the filing of returns for occupational and commodity taxes and penalties in respect to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, except that the collectors of internal revenue will remain charged with the routine inspection of the places of business of retail dealers in such liquors and liquids.

(e) The investigation, prevention, and detection of violations of the laws pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, or any regulations issued thereunder, and the apprehension of offenders against such laws.

(f) The detention and seizure, for violation of laws relating to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, of property, whether real or personal (except seizure under distraint warrant), and the custody, control, sale and disposition of property so seized.

(g) The discharge of liens under Section 902 of the Revenue Act of 1926.

3. There are conferred and imposed upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit, and the assistant inspectors and agents under

his supervision, subject to the direction of the Commissioner of Internal Revenue, and subject to such regulations as he may prescribe from time to time with the approval of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred and imposed upon the Secretary of the Treasury and/or the Commissioner of Internal Revenue under the provisions of the Executive order of March 10, 1934 (No. 6639), and of Section 4 (a) of the act approved March 3, 1927, entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," insofar as they relate to the duties to be performed by the Alcohol Tax Unit as enumerated in paragraph 2 hereof.

4. Except as may hereafter be otherwise provided, all regulations prescribed, all orders and instructions issued, and all forms adopted for the enforcement of the laws heretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol, and assistants, inspectors, and agents thereunder, and remaining in effect after the repeal of the eighteenth amendment, will continue in effect as regulations, orders, instructions, and forms of the Bureau of Internal Revenue: *Provided*, That the term "Commissioner" or "Commissioner of Industrial Alcohol" and the term "Supervisor" or "Supervisor of Permits," wherever used in such regulations, orders, instructions, and forms, shall be held to mean, respectively, "Deputy Commissioner of Internal Revenue" and "District Supervisor."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 10, 1934:
HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 202

HARRY FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 203

SAM FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 204

JOSEPH STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 43–45) has not yet been reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 3, 1937 (R. 41–42). The petition for writs of certiorari was filed July 8, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the four counts of the indictment charged but one offense, so that the trial court erred in imposing a separate punishment upon each count.

STATEMENT

Petitioners were indicted, with others, in the District Court of the United States for the Eastern District of Michigan on four counts of an indictment charging, in the first count, that from October 1, 1934, to and including the time of the filing of the indictment, the defendants unlawfully conspired together to possess, and cause to be possessed, certain stills and distilling apparatus for the production of distilled spirits, and to cause the same to be set up without having the same registered with the Collector of Internal Revenue, as required by law. The second count charged that between October 1, 1934, and the date of the filing of the indictment, the defendants unlawfully conspired together to

make and ferment, and to cause to be made and fermented, large quantities of mash in a building and on premises not duly authorized and designated according to law as a distillery. The third count charged that between the same dates the defendants unlawfully conspired together to carry on the business of distillers without having given bond, as required by law, and with the intent on their part to defraud the United States of the tax on spirits to be distilled. The fourth count charged that during the same period the defendants unlawfully conspired together to possess a large quantity of distilled spirits, namely, 775 gallons, at 5620 Federal Street, Detroit, Michigan, and 1,500 gallons at 4029 Milford Street, Detroit, Michigan, the immediate containers thereof not having affixed thereto the stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, all in violation of Title 18, Section 88, and Title 26, Sections 1162, 1185, 1184, and 1152a, United States Code, respectively. Different overt acts were set forth in support of each count (R. 1–8).

At the trial petitioners moved to consolidate the four counts of the indictment into one count, on the ground that the four counts constituted but one conspiracy and one crime. The motion was overruled (R. 32). Petitioners were convicted on all four counts of the indictment (R. 10) and each was sentenced to two years' imprisonment and to pay a

fine of $5,000 on each count, the imprisonment sentences to run consecutively and the fines to be cumulative (R. 10–15). Petitioners took separate appeals to the Circuit Court of Appeals for the Sixth Circuit (R. 16–27), where the convictions and sentences were affirmed (R. 41–45).

ARGUMENT

Petitioners contend that the four counts of the indictment charge but one conspiracy and one offense; that count three, charging a conspiracy to carry on the business of distillers without having given bond, comprises as ingredients and component elements counts one, two, and four, and that to compel petitioners to serve separate and distinct sentences on each count contravenes the Fifth and Eighth Amendments to the Constitution.

1. *In limine,* we deem it our duty to point out to this Court that the first count charges that the object of the conspiracy was a failure to register certain stills with the Collector of Internal Revenue, whereas the charge should have been that the object of the conspiracy was a failure to register the stills with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue, as required by law and regulations. Although this point does not appear to have been raised in the courts below and is not mentioned in the petition for writ of certiorari or in the supporting brief, it is obviously one arising upon the face of the record and may undoubtedly be considered by this Court. Cf. *United States* v. *Atkinson,* 297 U. S. 157, 160,

and cases cited. While Section 3258, Revised Statutes (U. S. C., Title 26, Sec. 1162), required stills to be registered with the Collector of Internal Revenue, the Circuit Courts of Appeals for the Fourth and Tenth Circuits have held, in *Benton* v. *United States,* 80 F. (2d) 162, certiorari denied, 297 U. S. 705, and *Scott* v. *United States,* 78 F. (2d) 791, where the question was raised, that the present statutes, Executive Order, and regulations [1] require that stills be registered with the District Supervisor of the Alcohol Tax Unit and that a charge of failure to register with the Collector of Internal Revenue states no offense. To the same effect are the decisions of the Circuit Courts of Appeals for the Second and Ninth Circuits, in *United States* v. *Lecato,* 29 F. (2d) 694 (C. C. A. 2d); *Silva* v. *United States,* 35 F. (2d) 598 (C. C. A. 9th), certiorari denied, 281 U. S. 751, and *Connley* v. *United States,* 46 F. (2d) 53 (C. C. A. 9th), where indictments charged the failure to register stills with the Collector of Internal Revenue instead of charging failure to register with the District Prohibition Administrator of the Bureau of Internal Revenue as required by law and regulations in effect during the prohibition era.[2] See also *United States* v. *Dibella,* 28 F. (2d) 805 (C. C. A. 2d), certiorari denied, 278 U. S. 658.

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[1] These are set forth in the opinions in the *Benton* and *Scott* cases, *supra.*

[2] During a portion of the prohibition era stills were registrable with the District Supervisor of Permits in the Bureau of Industrial Alcohol, Treasury Department. See *Benton* v. *United States, supra,* p. 163.

We have no reason to question the correctness of these decisions. There is, however, pending before this Court a petition for writs of certiorari in Nos. 258–261, *Frank E. Whitcombe et al.* v. *United States*, in which the contention is made, among others, that there is no statute or other authority empowering the Commissioner of Internal Revenue to provide by regulations or otherwise for the registration of stills with the District Supervisor of the Alcohol Tax Unit instead of with the Collector of Internal Revenue. This question of power was not specifically raised or considered in the cases above cited. For the reasons stated, however, in the Government's brief in opposition in Nos. 258–261, *supra*, we think that the contention made by the petitioners in those cases is without merit.

We believe that, in view of the decisions above referred to, if the question as to the defect in count one had been raised in the courts below, this count would undoubtedly have been dismissed or the convictions thereunder reversed. We, however, do not formally confess error because we feel that where a conviction of a criminal offense has been affirmed by a Circuit Court of Appeals such judgment should not be reversed except by this Court, after examination of the record. Accordingly, if writs of certiorari are denied in the cases of *Whitcombe et al. v. United States, supra,* we submit petitioners' convictions on the first count and the sentences thereon for such disposition as this Court may deem proper.

2. With respect to counts two, three and four, we submit that petitioners' contention that they charged but one crime is without merit and that the convictions thereon should be sustained. Count two charged a conspiracy to ferment mash, in violation of U. S. C., Title 26, Section 1185, which provides that no mash shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law. Count three charged a conspiracy to carry on the business of distillers without having given bond, as required by law, and with intent to defraud the United States of the tax on the spirits distilled, in violation of U. S. C., Title 26, Sec. 1184, which makes it an offense for any person to carry on the business of a distiller without having given bond, as required by law, or to engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him. Count four charged a conspiracy to possess a large quantity of distilled spirits in unstamped containers, in violation of Section 201 of the Liquor Taxing Act of 1934 (U. S. C., Title 26, Sec. 1152a), which provides that no person shall, except as therein provided, possess any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits. Different overt acts were charged in support of each count.

In the absence of a bill of exceptions (see R. 44) it must be assumed that the evidence was sufficient to support convictions of separate conspiracies to commit the several statutory offenses charged. While, as pointed out by the court below (R. 44), the acts of unlawfully setting up a still, illegally manufacturing mash, and possessing and trafficking in illicit liquors are often interrelated, Congress has by the internal revenue laws specifically provided that these acts shall constitute different offenses, and this Court, in *Albrecht* v. *United States,* 273 U. S. 1, 11, held that there is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit, and punishing also the completed transaction. A single act may be an offense against two statutes, and if each statute requires proof of some fact which the other does not, an acquittal or conviction under either statute does not exempt the accused from prosecution and punishment under the other. *Blockburger* v. *United States,* 284 U. S. 299, 304; *Gavieres* v. *United States,* 220 U. S. 338, 342. In order for indictments or counts to be identical they must be the same in law and in fact, and if they are perfectly distinct in point of law, however nearly connected in fact, they are still distinct and separate offenses. *Burton* v. *United States,* 202 U. S. 344, 380. In determining the question of identity of offenses, the test approved

by this Court is whether the same evidence is required to sustain them. *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Burton* v. *United States, supra*, p. 381; *Gavieres* v. *United States, supra*, p. 343; *Ebeling* v. *Morgan*, 237 U. S. 625, 631.

Applying this test to the counts in the instant case, the object of each conspiracy is one of the elements of the offense which must be alleged and proved. Obviously, the charge of conspiracy to manufacture mash could be proved without evidence, for instance, of whether a still had been set up and registered or not, whether the defendants were also carrying on the business of distillers without giving bond, or whether they possessed distilled spirits in unstamped containers. So, too, the charge of conspiracy to carry on the business of distillers without giving bond was not dependent for its proof on whether mash had been manufactured or liquor possessed in unstamped containers. Likewise, the charge of conspiracy to possess liquor in unstamped containers could be completely proved by evidence which made no reference whatever to the wholly unrelated and distinct transactions in the other counts. Each charge of conspiracy required an element of proof which was not necessary to the proof of the others. It is not uncommon for large illicit liquor operators to have independent organizations for supplying the raw materials, manufacturing the liquor, and selling and distributing the finished product. A conspir-

acy to do any one of these things with intent to defraud the revenue could be established without proof of any of the other transactions. Each transaction could be complete in itself. The evidence required to prove any one of the conspiracies charged in the instant indictment would not necessarily prove the existence of any of the others. Each conspiracy was a separate and distinct offense in no way connected as a component part of any of the acts designated as the object of the other conspiracies, and each conspiracy required proof of a separate and distinct fact not necessary in the proof of any of the others. The following language of the Circuit Court of Appeals for the Eighth Circuit in *Beddow* v. *United States,* 70 F. (2d) 674, 676, in which an indictment charged several conspiracies growing out of the same transaction and the convictions thereon were upheld, is applicable here:

> The contention that the conspiracy to forge (count 1) and the conspiracy to utter (count 4) constituted but one crime is also without merit. The accepted test of whether two charges are for the same crime is whether the evidence necessary to establish one of them establishes the other.
>
> * * * * *
>
> The evidence necessary to establish one of these offenses does not establish the other. For instance, the charge of conspiracy to forge the indorsement under count 1 would be complete if the transaction stopped there

> and no utterance were attempted; so that evidence which would completely establish the offense under count 1 would not establish the commission of the crime under count 4. On the other hand, the conspiracy to utter, charged in count 4, might be completely proven without reference to any conspiracy to forge the indorsements; all the necessary proof being that the indorsement was forged and there was a conspiracy to utter the forged instrument. Since the proof of either of these charges does not establish the other, they are properly charged as separate offenses separately defined in this statute.

In *Burton* v. *United States, supra,* where it was held that agreeing to receive and the receiving of certain forbidden compensation were separate offenses, this Court said (pp. 377–378):

> But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the

> legislature, not the court, which is to define a crime, and ordain its punishment."

In *Blockburger* v. *United States, supra,* it was held that the single sale of a certain drug not in or from the original stamped package, and not in pursuance of a written order of the purchaser, as required by the Harrison Narcotic Act, constituted separate offenses. In *Albrecht* v. *United States, supra,* it was held that possessing and selling the same liquor were distinct offenses. In *Morgan* v. *Devine,* 237 U. S. 632, it was held that by breaking into a post office and stealing property therein two separate offenses were committed: This Court said (p. 639):

> Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself.

A number of decisions to the same effect in the courts below are cited in the opinion of the Circuit Court of Appeals in the instant case (R. 45). While petitioners cite some cases as showing a contrary view, they present no such conflict as to require the issuance of writs of certiorari on this point. If not distinguishable on the facts and the statutes involved, they have not been followed by the great majority of decisions or by later decisions of this Court.

3. While for the foregoing reasons we think the convictions on counts two, three, and four were proper, there arises the question whether the sentences of imprisonment on count two should stand, if this Court decides that the convictions and sentences on count one should be reversed. Each sentence of imprisonment on count two provides that it shall take effect "from and after expiration of term of imprisonment imposed on Count One." (R. 11, 13, 15.) If count one and the sentences thereon are eliminated, there will be no term of imprisonment on count one to expire and it will leave the date of the commencement of the sentences on count two indefinite. This is also true of the sentences of imprisonment on the remaining counts, as each is to begin to run upon the expiration of the sentence of imprisonment on the preceding count. It would seem, therefore, that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite.

CONCLUSION

While we are of the opinion that the convictions on counts two, three, and four should be upheld, the cases are submitted, if the writs of certiorari are denied in the cases of *Whitcomb et al.* v. *United States, supra,* for such disposition as to the convictions and sentences on count one and the amendment of the sentences of imprisonment on

the remaining counts as this Court may deem proper.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 202

HARRY FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 203

SAM FLEISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 204

JOSEPH STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 35–37) is reported in 91 F. (2d) 404.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 3, 1937. (R. 34.) The petition for writs of certiorari was filed July 8, 1937, and granted October 11, 1937. (R. 38–39.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question presented, as limited by this Court in granting the petition for writs of certiorari, is whether the first count of the indictment states an offense under Federal law.

STATUTE INVOLVED

Section 37 of the Criminal Code, 35 Stat. 1096 (U. S. C., Title 18, Sec. 88), follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

STATEMENT

Petitioners were indicted, with others, in the District Court of the United States for the Eastern

District of Michigan on four counts of an indictment charging conspiracies to violate various provisions of the internal revenue laws. The first count, the one here involved, charged that the defendants—

> did, in the Eastern District of Michigan, Southern Division, from, to-wit, the 1st day of October, A. D. 1934, to and including the time of the filing of this indictment, unlawfully, feloniously, knowingly and willfully conspire, combine, confederate, arrange and agree together and each with the other to commit at the times aforesaid at, to wit: 5620 Federal Street, in the City of Detroit, in the County of Wayne, State of Michigan, and within the jurisdiction of this Honorable Court, an offense against the laws of the United States, that is to say, that the said aforementioned defendants and co-conspirators would, during the aforementioned time and at the aforementioned place, unlawfully, knowingly, willfully and feloniously possess and cause to be possessed, keep in custody, control and cause to be controlled certain stills and distilling apparatus for the production of distilled spirits, and would set up and cause to be set up the said aforementioned stills and distilling apparatus without having the same registered with the Collector of Internal Revenue as required by law; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Certain overt acts were set forth. (R. 1–2.)

Petitioners were convicted on all four counts of the indictment (R. 8) and each was sentenced to two years' imprisonment and to pay a fine of $5,000 on each count, the imprisonment sentences to run consecutively and the fines to be cumulative (R. 9–12). Upon separate appeals to the Circuit Court of Appeals for the Sixth Circuit (R. 12–23) the convictions and sentences were affirmed (R. 34–37). Petitioners thereupon applied to this Court for writs of certiorari and, on October 11, 1937, the petition was granted, limited to the question whether the first count of the indictment states an offense under Federal law (R. 38–39).

SUMMARY OF ARGUMENT

The first count of the indictment charged as the object of the conspiracy the possession of certain stills, etc., without having the same registered with the Collector of Internal Revenue as required by law. Applicable laws and regulations required that stills be registered with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue.

Indictments charging the possession of stills without having the same registered with the Collector of Internal Revenue have been held to charge no offense. While not free from doubt, in our opinion the object of the conspiracy as set forth in the first count does not describe an offense

against the laws of the United States, and the charge must therefore fail.

There is the possibility of treating the words "Collector of Internal Revenue" as surplusage. We believe, however, that the phrase is a material allegation or at least descriptive matter which cannot be so rejected.

There is also the possibility of applying the doctrine of aider by verdict, but we have concluded that the count in question is not one involving merely a defective statement of an offense, which would be aided by verdict, but an entire failure to charge a crime.

ARGUMENT

The question as to whether the first count of the indictment stated an offense was not raised in the courts below or in the petitioners' application for writs of certiorari. In view, however, of petitioners' conviction on that count and the separate sentences of two years' imprisonment and $5,000 fine imposed thereunder, the Government deemed it to be its duty to point out to this Court in its brief in reply to the petition for writs of certiorari that the count charged as the object of the conspiracy the possession, etc., of certain stills, etc., "without having the same registered with the Collector of Internal Revenue as required by law," and that several Circuit Courts of Appeals have held that an indictment charging a failure to register stills with the Collector of Internal Revenue states no offense.

The count in question was obviously drawn under Section 3258, Revised Statutes (U. S. C., Title 26, Sec. 1162), which provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

1. However, it seems clear to us that the requirement of R. S., Sec. 3258 to register stills with the Collector of Internal Revenue is no longer applicable to the registration of stills. The legislation and executive action taken with respect to this subject are rather complicated, so we will set forth the successive steps in considerable detail.

Up to April, 1927, stills were registerable with the Collector of Internal Revenue. But on March 3, 1927, Congress passed the Reorganization Act (c. 348, 44 Stat. 1381) creating in the Treasury Department a Bureau of Prohibition, with a Commissioner of Prohibition at the head thereof. One of the duties theretofore imposed on the Commissioner of Internal Revenue and his assistant, the collector, was to receive the registration of stills. This duty Congress by Section 4 (a) of the above Act transferred to the Secretary of the Treasury.[1] The Act of 1927, *supra*, however, further provided (Sec. 4 (b)) that the Secretary of the Treasury could confer on the Commissioner of Prohibition, or any of the officers or employees of the Bureau of

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[1] "The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury."

Prohibition, the powers and duties imposed on him by the Act.[2] This the Secretary did, on April 1, 1927, by issuing Bureau of Prohibition Treasury Decision No. 1.[3] Among other duties imposed on the Commissioner of Prohibition were those set forth in Article IV, paragraph 2, subdivisions (a) and (b), reading as follows:

> (2) There are also hereby conferred and imposed upon the Commissioner of Prohibition, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision (a) of section 4 of the above act of March 3, 1927) by any law, in so far as such rights, privileges, powers, and duties relate to—

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[2] "The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes."

[3] See appendix (p. 213 *et seq.*) to Bureau of Industrial Alcohol Regulations No. 2, effective April 1, 1931, relating to permits, etc., prescribed jointly by the Secretary of the Treasury and the Attorney General under the Prohibition Reorganization Act of 1930.

(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids.

(b) The establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored.

Paragraph 3 of the above article authorized the Commissioner of Prohibition to prescribe regulations with the approval of the Secretary of the Treasury. Shortly after the passage of the Reorganization Act of 1927, *supra*, District Prohibition Administrators were appointed in the Bureau of Prohibition and the duty of receiving registrations of stills was imposed upon them. This was confirmed by Article 18 of Regulations No. 3, Bureau of Prohibition, relating to industrial alcohol, etc., revised August, 1927, and effective October 1, 1927, reading, in part, as follows:

Proprietors of industrial-alcohol plants, distillers, and all others who set up stills, except retorts for production of wood alcohol and glass laboratory stills of small capacity, must register them in quadruplicate on Form 26 with the *administrator of the district* in which set up, except where such

> stills have heretofore been registered and no change in ownership or location has occurred since such registry. * * *. [Italics supplied.]

Thereafter, Congress passed the Prohibition Reorganization Act of May 27, 1930 (c. 342, 46 Stat. 427), which created in the Department of Justice a Bureau of Prohibition and transferred to it certain enforcement work theretofore performed by the Bureau of Prohibition in the Treasury Department with respect to the National Prohibition Act and the internal revenue laws where a violation of the National Prohibition Act was involved. The administration of the laws relating to the legal production and distribution of liquor under the internal revenue laws and Title III of the National Prohibition Act, including the registration of stills, remained, however, in the Treasury Department. Section 5 of the Act provided for the issuance of certain joint regulations by the Secretary of the Treasury and the Attorney General and declared that regulations issued prior to the effective date of the Act should no longer be in force. The Act also changed the name of the Bureau of Prohibition to the Bureau of Industrial Alcohol, Section 8 providing:

> The Bureau of Prohibition in the Treasury Department shall hereafter be known as the Bureau of Industrial Alcohol, and the Commissioner of Prohibition in the Treasury Department shall hereafter have the title of Commissioner of Industrial Alcohol.

Pursuant to this legislation the Secretary of the Treasury, on July 1, 1930, approved Bureau of Industrial Alcohol Regulation No. 1 which established in the Bureau of Industrial Alcohol twelve permissive districts, in lieu of the administrative districts theretofore existing, and provided for the appointment in each district of a supervisor of permits, who should perform such duties as might be provided by regulations.[4] On June 30, 1930, Bureau of Prohibition Treasury Decision No. 54 was issued, providing as follows:

> Effective 12:01 a. m., July 1, 1930, all rights, powers, privileges, and duties of prohibition administrators and assistant prohibition administrators of the Bureau of Prohibition in the Treasury Department, within their respective administrative districts, are transferred to and conferred and imposed upon Supervisors of Permits and Assistant Supervisors of Permits, respec-

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[4] "There are hereby established in the Bureau of Industrial Alcohol 12 permissive districts, in lieu of the administrative districts heretofore existing. The Commissioner of Industrial Alcohol, with the approval of the Secretary of the Treasury, shall appoint for each permissive district a supervisor of permits, who shall perform such duties, under the supervision of the commissioner, as may be provided by regulations. The commissioner may, with the approval of the Secretary, appoint for any district one or more assistant supervisors, who shall assist the supervisor in the performance of his duties. An assistant supervisor may be designated by the commissioner to act as supervisor during the absence or disability of the supervisor, or in the event that there is no supervisor for the district. * * *"

> tively, within their respective Permissive Districts, except as otherwise provided by law or regulations promulgated thereunder.

The change with respect to the registration of stills from the prohibition administrator to the supervisor of permits was provided for in Regulations No. 3, Bureau of Industrial Alcohol, Treasury Department, approved jointly by the Secretary of the Treasury and the Attorney General on March 24, 1931, to be effective as of April 1, 1931. Article 14 of these regulations provided:

> Every person, including the proprietor of an industrial-alcohol plant, having in his possession or custody, or under his control, any still or distilling apparatus set up, except retorts for the production of wood alcohol and glass laboratory stills of small capacity, shall register the same in quadruplicate on Form 26 with the *supervisor of the district* in which set up, except where such stills have heretofore been registered and no change in ownership, possession, custody, control, or location has occurred since such registry. * * * [Italics supplied.]

On March 3, 1933, Congress passed the Act (c. 212, 47 Stat. 1489) empowering the President to regroup Government agencies, and by Executive Order No. 6639, promulgated March 10, 1934 (U. S. C., Title 5, Sec. 132, note), he directed that the Bureau of Industrial Alcohol and the office of Commissioner of Industrial Alcohol be abolished

and the rights and powers imposed on the Commissioner of Industrial Alcohol transferred to the Commissioner of Internal Revenue. Authority was also given the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe regulations.[5]

On May 10, 1934, the effective date of Executive Order No. 6639, Treasury Decision No. 4432 was approved by the Secretary of the Treasury.[6] This

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[5] "The Bureau of Industrial Alcohol and the office of Commissioner of Industrial Alcohol are abolished, and the authority, rights, privileges, powers, and duties conferred and imposed by law upon the Commissioner of Industrial Alcohol are transferred to and shall be held, exercised, and performed by the Commissioner of Internal Revenue, and his assistants, agents, and inspectors, under the direction of the Secretary of the Treasury. * * *"

[6] "1. There is hereby established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, at the head of which shall be a Deputy Commissioner of Internal Revenue appointed as required by law.

2. "The Alcohol Tax Unit shall be charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

"(a) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids;

"(b) The establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored;

* * * * *

"3. There are conferred and imposed upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol

Decision established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, headed by a Deputy Commissioner of Internal Revenue. Paragraph 2 of the Decision charged the Alcohol Tax Unit with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws respecting the subjects enumerated in subdivisions (a) to (g), inclusive, of paragraph 2. Paragraph

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Tax Unit, and the assistants, inspectors, and agents under his supervision, subject to the direction of the Commissioner of Internal Revenue and subject to such regulations as he may prescribe from time to time with the approval of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred and imposed upon the Secretary of the Treasury and/or the Commissioner of Internal Revenue under the provisions of the Executive Order of March 10, 1934 (No. 6639), and of section 4 (a) of the Act approved March 3, 1927, entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury", in so far as they relate to the duties to be performed by the Alcohol Tax Unit as enumerated in paragraph 2 hereof.

"4. Except as may hereafter be otherwise provided, all regulations prescribed, all orders and instructions issued, and all forms adopted for the enforcement of the laws heretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol, and assistants, inspectors, and agents thereunder, and remaining in effect after the repeal of the Eighteenth Amendment, will continue in effect as regulations, orders, instructions, and forms of the Bureau of Internal Revenue: *Provided*, That the term 'Commissioner' or 'Commissioner of Industrial Alcohol' and the term 'Supervisor' or 'Supervisor of Permits', wherever used in such regulations, orders, instructions, and forms, shall be held to mean, respectively, 'Deputy Commissioner of Internal Revenue' and 'District Supervisor.'"

3 of the Decision conferred upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit and the assistants, investigators and agents under his supervision, subject to the direction of the Commissioner of Internal Revenue and subject to such regulations as he might from time to time prescribe with the approval of the Secretary of the Treasury, all the rights, privileges, powers and duties conferred and imposed upon the Secretary of the Treasury or the Commissioner of Internal Revenue under the provisions of Executive Order No. 6639 and Section 4 (a) of the Reorganization Act of March 3, 1927, *supra*. Paragraph 4 adopted all regulations prescribed for the enforcement of the laws theretofore administered by the Commissioner of Industrial Alcohol, or the Bureau of Industrial Alcohol, and continued them in effect as regulations of the Bureau of Internal Revenue, providing that the term "Supervisor" or "Supervisor of Permits" wherever used in such regulations should mean "District Supervisor." Under this Treasury Decision the District Supervisor of the Alcohol Tax Unit succeeded to the duties of the Supervisor of Permits in the Bureau of Industrial Alcohol and after the promulgation of this Decision on May 10, 1934, stills were required to be registered with the District Supervisor of the Alcohol Tax Unit.

That the Treasury officials had power to change the registration of stills from the Collector of In-

ternal Revenue to the District Supervisor of the Alcohol Tax Unit amply appears, we think, from the foregoing Reorganization Acts and the Executive Order.[7] If Congress could provide for the registration of stills with the Collector of Internal Revenue in the first place, it could change this duty and confer it on any other official. This it did in the several Reorganization Acts, at the same time giving the Secretary of the Treasury power to confer the duty on any of his subordinates. That the Secretary of the Treasury and the Commissioner of Internal Revenue, pursuant to this authority, properly delegated the duty of receiving the registration of stills to the District Supervisor of the Alcohol Tax Unit, clearly appears, we submit, from the foregoing Treasury Decisions and regulations. While the still possessor was not specifically mentioned, Congress gave the Secretary of the Treasury a mandate to modify the existing system with respect to the duties of his Department and personnel. It obviously intended that if and when the Secretary of the Treasury modified the system

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[7] This question of power is referred to because of the contention made in the cases of *Frank E. Whitcombe et al.* v. *United States*, Nos. 258–261, now pending before this Court on a petition for writs of certiorari, that there was no power conferred on the Secretary of the Treasury or the Commissioner of Internal Revenue to change by regulations the duty imposed on a citizen by Section 3258 R. S. to register a still with the Collector of Internal Revenue and require him to register with the District Supervisor of the Alcohol Tax Unit.

and transferred the duties of the Treasury officials and subordinates such transfer should affect all concerned to the extent necessary to accomplish the transfer.

It will therefore be seen from the foregoing that on the date of the alleged offense, to-wit, October 1, 1934, to and including the time of the filing of the indictment on October 30, 1935 (R. 1), the petitioners were required to register their stills with the District Supervisor of the Alcohol Tax Unit, and not with the Collector of Internal Revenue as charged in count one of the indictment.

2. The situation, then, is one in which the defendants were indicted for a conspiracy to possess stills without their registration with the Collector of Internal Revenue. But Section 37 of the Criminal Code, *supra,* punishes only conspiracies to commit an offense against the United States and it was not an offense to possess a still which had not been registered with the Collector of Internal Revenue. Accordingly, we are of the opinion that the first count of the indictment charged no offense.

The decisions of the Circuit Courts of Appeals which have considered indictments charging a failure to register a still with the Collector of Internal Revenue, as required by law, have held that such indictments charge no offense. In *Benton* v. *United States,* 80 F. (2d) 162, certiorari denied, 297 U. S. 705, the first count of an indictment drawn under this section charged the defendants

with the possession of a still without having registered the same with the Collector of Internal Revenue, as required by law. The defendant contended that at the time of the alleged offense, to-wit, on April 23, 1934, it was no longer incumbent upon a person having a still in his possession to register it with the Collector of Internal Revenue, as required by Section 3258, Revised Statutes, and that therefore the count stated no offense. In upholding this contention, the Circuit Court of Appeals for the Fourth Circuit said (pp. 163–164):

> We are of the opinion that this point was well taken. That section was re-enacted by the act of November 23, 1921, 42 Stat. 222 (page 223, section 5 [27 U. S. C. A. sec. 3], supplemental to the National Prohibition Act, *United States* v. *Stafoff*, 260 U. S. 477; but it has been modified by subsequent legislation with the result that between April 1, 1927, and July 1, 1930, stills were registerable with the District Prohibition Administrators, and between July 1, 1930, and May 10, 1934, with the District Supervisor of Permits in the Bureau of Industrial Alcohol, and since May 10, 1934, with the District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue. It follows, that on the date charged in the first count of the indictment in the pending case, a distiller was not required to register with the collector of internal revenue as charged, and that count must fall, since it stated no offense.

In *Scott* v. *United States*, 78 F. (2d) 791, the indictment charged a failure to register a still with the Collector of Internal Revenue, as required by law. After reviewing the statutes on the subject passed subsequent to Section 3258, Revised Statutes, and the regulations promulgated thereunder, the Circuit Court of Appeals for the Tenth Circuit said (p. 793):

> The indictment charged a failure to register the still with the Collector of Internal Revenue. The statutes and regulations thereunder in force on July 31, 1934, required registration with the supervisor of the district in which the still was set up.
> * * *
>
> We conclude the indictment failed to charge facts sufficient to constitute an offense against the United States.

To the same effect are the decisions of the Circuit Courts of Appeals for the Second and Ninth Circuits, in *United States* v. *Lecato*, 29 F. (2d) 694 (C. C. A. 2d); *Silva* v. *United States*, 35 F. (2d) 598 (C. C. A. 9th), certiorari denied, 281 U. S. 751, and *Connley* v. *United States*, 46 F. (2d) 53 (C. C. A. 9th), where indictments charged the failure to register stills with the Collector of Internal Revenue instead of charging failure to register with the District Prohibition Administrator of the Bureau of Internal Revenue as required by law and regulations in effect during a portion of the prohibition era. See also *United States* v.

Dibella, 28 F. (2d) 805 (C. C. A. 2d), certiorari denied, 278 U. S. 658. Cf. *Stork Restaurant Corp.* v. *McCampbell,* 55 F. (2d) 687, 690 (D. C. S. D. N. Y.).

3. It might be argued that the count in question is one for conspiracy; that the conspiracy is the gist of the offense, separate and distinct from the offense which is the object of the conspiracy; that the object of the conspiracy need not be pleaded with the detail and particularity required in charging the substantive offense (*Thornton* v. *United States,* 271 U. S. 414, 423); and that therefore the charge was sufficient. However, the conspiracy statute (U. S. C., Title 18, Sec. 88) makes it a crime only if two or more persons conspire *to commit an offense against the United States,* or to defraud the United States, providing one or more of the parties do an act to effect the object of the conspiracy. The charge here is a conspiracy to commit "an offense against the laws of the United States." Unless the object of the conspiracy is an offense against the laws of the United States the charge must fail. *United States* v. *Britton,* 108 U. S. 199. While liberality is permitted in pleading the object of the conspiracy, the offense which the defendants conspired to commit must be identified. In *Williamson* v. *United States,* 207 U. S. 425, 447, it was said that "in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the

offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." *Clark,* Criminal Procedure, 2d ed. p. 178, says: "A pleading is certain to a common intent when it is clear enough according to reasonable intendment or construction, though not worded with absolute precision." Since, then, the defendants were required by law to register their stills with the District Supervisor of the Alcohol Tax Unit, the question is whether the object of the conspiracy, which is stated to be the possession etc., of certain stills etc., without having the same registered with the Collector of Internal Revenue as required by law, is set out in a manner to come within the scope of the above quoted rule. As bearing on the identification of the offense, it may be significant that the question was not raised at any time by the defendants.

If the count had failed to name the officer with whom the stills were to be registered, and merely charged a failure to register as required by law and regulations, the charge would probably have been sufficient to bring it within the present law. It was, in effect, so held by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Lecato, supra,* p. 694. The phrase "as required by law and regulations" would undoubtedly have carried with it the connotation that the still was not registered with the officer authorized to accept registrations. The name of the officer, if deemed

necessary to the defendants' defense, could have been supplied by a bill of particulars. So, too, this might have been the result had the charge been a failure to register with the Collector or any other person, as required by law. But the question remains, having set out the object of the conspiracy with unnecessary particularity might the court have rightfully held the words "with the Collector of Internal Revenue", to be mere surplusage, so as to make the charge applicable to the present law and regulations? This inquiry must be measured against the rule that no allegation can be rejected as surplusage whether it be necessary or unnecessary, or more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment. *United States* v. *Weiss,* 293 Fed. 992, 995 (D. C. N. D. Ill.). See also Justice Story's opinion in *United States* v. *Howard,* 26 Fed. Cas. 388, No. 15403. We incline to the view that the phrase "with the Collector of Internal Revenue", is material matter and may not therefore be rejected as surplusage. It specifies and makes certain the alleged crime and cannot be brushed aside as immaterial.

It seems to be immaterial that an indictment may have been based upon a particular statute which has been repealed or under which the charge otherwise cannot be sustained. If the facts pleaded bring it within some existing statute, it will be

upheld and treated as having been filed under such statute. Allegations not essential to a charge under the latter statute will be treated as surplusage. *Maresca* v. *United States,* 277 Fed. 727, 741–742 (C. C. A. 2d), certiorari denied, 257 U. S. 657; *Farley* v. *United States,* 269 Fed. 721, 724 (C. C. A. 9th); Cf. *Williams* v. *United States,* 168 U. S. 382, 389; *United States* v. *Nixon,* 235 U. S. 231, 235. In the *Farley* case the defendant was indicted under Section 3242, Revised Statutes, for unlawfully carrying on the business of a retail liquor dealer without having paid the special tax as required by law. The court held that Section 3242 had been impliedly repealed by the National Prohibition Act but that the indictment sufficiently charged a sale of liquor in violation of the National Prohibition Act and it was therefore sustained. The allegation with respect to the omission to pay the special tax was treated as surplusage. In the *Maresca* case, *supra,* the third count of the indictment charged the defendants with unlawfully selling, on November 15, 1919, for beverage purposes, a quantity of distilled spirits manufactured from foods, fruits and feeds after September 9, 1917, contrary to the Lever Act. The court held that at the time of the alleged offense the Lever Act was not in existence, having been superseded by the War Prohibition Act, but it sustained the count under the latter Act. The allegation that the spirits were manufactured from certain food materials after September 9, 1917, was regarded as

surplusage, it being immaterial under the War Prohibition Act when the spirits were distilled.

To bring the present count within existing law and regulations, under the ruling of the above cases, the phrase, "with the Collector of Internal Revenue," would have to be rejected as surplusage. But this, it would seem, could not be done because it is a material part of the charge. It not only affirmatively specifies the person with whom the stills were supposed to be registered but in effect negatives that they were registerable with some one else. The law required them to be registered elsewhere. If the phrase, "with the Collector of Internal Revenue," be rejected as surplusage, it would seem that the modifying phrase, "as required by law," would also have to be rejected, thus leaving the charge without a criminal offense as the object of the conspiracy. The phrase, "as required by law," we think, modifies the words, "with the Collector of Internal Revenue," and not the preceding phrase, "without having the same registered." In *Scott* v. *United States, supra,* p. 793, the Circuit Court of Appeals for the Tenth Circuit held that the general language, "as required by law," in the indictment in that case was controlled by the specific language which preceded it. We are of the opinion that the phrase, "as required by law," was a conclusion of the pleader

which was not justified by the facts pleaded with respect to the failure to register with the Collector.

In *United States* v. *Lecato, supra,* the Government contended that naming the wrong person with whom the still was required to be registered is like misnaming the statute under which the crime is laid; "but," said the court (p. 694), "the trouble goes deeper, because the indictment lays no crime at all, unless it would have been good without any allegation whatever as to registration."

The *Scott* and *Lecato* cases, *supra,* involved the question of violation of Title 26 U. S. C. § 1162, while here the question is not one of violation of that section but of a conspiracy to violate it. Recognizing this distinction, still they establish that the object of the conspiracy as set out is not criminal. And an indictment for conspiracy is bad if it does not set forth the object specifically and show that it is criminal. *United States* v. *Cruikshank,* 92 U. S. 542.

4. We believe the Court also should note the possible application of the doctrine of aider by verdict. Defects in pleading are aided by intendment; that is, the court will after verdict, presume or intend that the particular thing which is imperfectly stated was duly proved at the trial, when it was within the issue made by the pleadings, and must have been proved to authorize the verdict. The court in the *Scott* case, *supra,* seemed to rec-

ognize the possibility of the application of this doctrine when it said at p. 793:

> The indictment charged a failure to register the still with the Collector of Internal Revenue. The statutes and regulations thereunder in force on July 31, 1934, required registration with the supervisor of the district in which the still was set up. The general language in the indictment "and as required by law," was controlled by the specific language which preceded it, and was not enough to save the indictment *when its sufficiency was seasonably and properly challenged.* [Italics supplied.]

This emphasized language might well be taken to mean that had the indictment not been challenged before verdict, it would have been sufficient after verdict.

We think, however, the count in question is not one involving merely a defective statement of an offense, but an entire failure to charge a crime. The problem here is essentially equivalent to that just discussed, whether the specification of the Collector of Internal Revenue was immaterial surplusage. As there we were of the opinion that the specification was material, so here we believe that the entire failure to charge a crime cannot be viewed as a minor defect susceptible of cure by verdict.

If this Court should decide that the convictions and sentences on count one ought to be reversed,

there arises the question whether the sentences of imprisonment on count two should stand. Each sentence of imprisonment on count two provides that it shall take effect "from and after expiration of term of imprisonment imposed on Count One." (R. 9, 10, 11.) If count one and the sentences thereon are eliminated, there will be no term of imprisonment on count one to expire and it will leave the date of the commencement of the sentences on count two indefinite. This is also true of the sentences of imprisonment on the remaining counts, as each is to begin to run upon the expiration of the sentence of imprisonment on the preceding count. It would seem, therefore, that the sentences of imprisonment on count two should be amended so as to make their date of commencement definite.

CONCLUSION

While we are of the opinion that the first count of the indictment does not state an offense under Federal law, that therefore the convictions and sentences on this count should be reversed, and that the sentences on the remaining counts should be amended so as to make their date of commencement definite, we do not formally confess error because we feel that where a conviction of a criminal offense has been affirmed by a Circuit Court of Appeals such judgment should not be reversed except by this Court after examination of the rec-

ord. We accordingly submit the case for decision. Cf. *Taylor* v. *United States*, 286 U. S. 1, 5.

Respectfully submitted,

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NOVEMBER, 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 202, 203, 204.—October Term, 1937.

Harry Fleisher, Petitioner,
202 *vs.*
The United States of America.

Sam Fleisher, Petitioner,
203 *vs.*
The United States of America.

Joseph Stein, Petitioner,
204 *vs.*
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 6, 1937.]

Per Curiam.

Judgments of conviction on four counts of an indictment charging conspiracies to violate provisions of the internal revenue laws were affirmed by the Circuit Court of Appeals. 91 F. (2d) 404. Certiorari was granted, limited to the question whether the first count of the indictment states an offense under federal law.

The first count alleged that defendants from October 1, 1934, to the date of the indictment, October 30, 1935, unlawfully conspired to possess, and caused to be possessed, stills and apparatus for the production of distilled spirits without having the same registered with the Collector of Internal Revenue as required by law. The Government concedes that under the applicable law the charge should have been that there was failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. The first count failed to state an offense. Act of March 3, 1927, c. 348, 44 Stat. 1381; 5 U. S. C. 281 c; Prohibition Reorganization Act of May 27, 1930, c. 342, 46 Stat. 427; Regulations No. 3, Bureau of Industrial Alcohol, Treasury Department (March 24, 1931), Article 14; Act of March 3, 1933, c. 212, sec. 16, 47 Stat. 1518; Executive Order No. 6639, March 10, 1934, 5 U. S. C. 132 note; Treasury Decision No. 4432, May 10, 1934.

Scott v. *United States,* 78 F. (2d) 791; *Benton* v. *United States,* 80 F. (2d) 162.

The sentence upon count two provides that it shall run "from and after expiration of term of imprisonment imposed on count one". Each of the sentences on the remaining counts runs from the expiration of the term of imprisonment imposed on the preceding count. In view of the invalidity of the sentence on count one, the sentences on the remaining counts should be amended so as to fix a definite date for their commencement.

The judgments on count one are severally reversed and the causes are remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.